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In The

Supreme Court of the United States

October Term, 1994

ASSOCIATION OF FRIGIDAIRE MODEL MAKERS, *et al.*,

Petitioners,

vs.

GENERAL MOTORS CORPORATION, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court in *Airline Pilot's v. O'Neill*, 111 S. Ct. 127 (1991), merely clarified the law applicable to breach of contract and breach of duty of fair representation cases pursuant to 29 U.S.C. § 185(a) (1947) or whether the *Airline Pilot's* decision announced a change in the law.

II. When does a judgment in the liability phase of a bifurcated trial become final so that it is the "law of the case"?

III. Whether Petitioners have been denied due process under the Seventh Amendment of the United States Constitution due to the unreasonable delays by the lower court in deciding post trial motions.

LIST OF PARTIES

Petitioners:

Association of Frigidaire Model Makers, Billie N. Scherer, Enos O. McNeeley, James E. Minter, Harry M. Simpson, William A. Shaw, Dale L. Frederick, Robert P. Ruth, Arthur V. Holz, M.L. Withrow, Jere M. Utz, Paul B. Scott, Donald M. McWhirter, Rankin C. Long, Kenneth R. Henness, Herbert C. Douglas, Jack C. Brewer, Jr., Estate of Richard E. Wells, Phillip K. Harris, Michael Irwin Davis, Gary L. High, James G. Strausbaugh, Gary D. Saunders, Gary E. Wright, Larry Hackathorne, David D. Flora, Vernon A. Lawson, Henry C. Gottwald, Wesley M. Myers, Donald S. Bowman, Rosemary Bowman Theis, Sam Freeman, Carol George, Robert Guenther, Stanley J. Hake, J.R. Hock, Estate of Al Henderson, Betty Irwin, G.P. Jones, A.L. Leach, Jerry Monnin, Barney Monnin, W.R. Morter, Estate of Carl A. Schreier, Paul Scott, Charles Shanyfelt, Terry Copsey, Art Whisman, Estate of Don Thill, Harry Glaser, Bruce Fryman, Sue Gilbert, Richard Gruver, Glen Musen.

Respondents:

General Motors Corp. and International Union of Electrical, Radio and Machine Workers, Local 801 AFL-CIO-CLC.

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No.

In The

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ASSOCIATION OF FRIGIDAIRE MODEL MAKERS, *et al.*,

Petitioners,

vs.

GENERAL MOTORS CORPORATION, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

The Association of Frigidaire Model Makers, *et al.*, the Petitioners herein, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on March 31, 1995.

OPINIONS BELOW

The March 31, 1995 opinion of the Sixth Circuit Court of Appeals whose judgment is herein sought to be reviewed is reported at Case Nos. 93-3184/3245/3645/3697, which Decision is unpublished and is reprinted in the separate appendix to this Petition at pages 1a-14a. The prior opinion of the United States District Court for the Southern District of Ohio entered December 31, 1992 and is reported at Case No. C-3-81-343, is unpublished and is reprinted in the separate Appendix to this Petition at pages 15a-21a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 31, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISION, STATUTES, AND RULE INVOLVED

U.S. Const. amend. VII.

> In Suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Labor Management Relations Act (29 U.S.C. § 185(a) (1947)).

> Suits for violation of contracts between an

employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Renewal for Motion for Judgment After Trial: Alternative Motion for A New Trial (Fed. R. Civ. P. 50(b)).

Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by a service and filing not later than ten days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion of judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

STATEMENT OF THE CASE

This case began in February, 1979 when General Motors Corporation sold its Frigidaire operations in Dayton, Ohio. General Motors did not sell the physical facility, instead it began converting the physical facility to Chevrolet manufacturing facilities. At the time of the sale of the operations, employees of General Motors Corporation were represented by The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC and by its Local Union 801.

For the purpose of completing the conversion, the Unions and the Company entered into several agreements which affected or impacted then current Labor Agreements (both local and national) and set forth procedures for utilizing bargaining unit members to perform or assist in performing the conversion work.

Over two years after the announcement of the sale forty-nine employees of General Motors formed the Association of Frigidaire Model Makers for the purpose of protecting the interests of these former and/or current General Motors employees and filed a Complaint in the United States District Court for the Southern District of Ohio. That Complaint named as Defendants General Motors Corporation, The International Union of Electrical, Radio and Machine Workers, and its Local Union 801. The Complaint was a hybrid § 301 action (29 U.S.C. § 185(a)) and it alleged breach of the Labor Agreement as well as breach of duty of fair representation.

For the purposes of trial, the court recommended and the parties consented to a bifurcated trial in which liability issues would be determined before the issues related to damages would be addressed.

On June 15, 1982, the jury trial commenced in the United

States District Court on the liability issues only[1]. The liability issues were whether the Labor Agreement had been breached and whether the unions had committed violations of § 301 by failing to properly represent the Petitioners. Petitioners alleged, among other things, that a labor agreement was entered into pursuant to which Petitioners were to be immediately reclassified and recalled, along with other former General Motor employees, to perform work related to the conversion of the physical facility and installation of new equipment. This immediate reclassification and recall would give the recalled employees Chevrolet seniority immediately upon recall. The recalled employees would be eligible for recall in line with their plant seniority as well as skilled trade seniority. All employees, including skilled employees were to be reassigned to classifications of available skilled trades which would be utilized in the manufacturing process in the new Chevrolet operation.

On June 23, 1982, a jury returned a verdict in favor of the Petitioners on the liability issues. Then began the first of several judicial delays which ultimately resulted in non-suiting the Petitioners nearly thirteen years after a verdict was returned in their favor, and seven years after the Court of Appeals affirmed that verdict. Respondents timely filed a Motion for a New Trial and a Motion for Judgment Notwithstanding the Verdict in July, 1982. These motions remained "pending" in the district court with no decision until September, 1983, some fifteen months after the verdict was returned. In the meantime, the United States Supreme Court issued its decision in *Del Costello v. Teamsters,* 462 U.S. 151 (1983). In *Del Costello,* this Court applied the six month statute of limitation contained in the National Labor Relations Act (29 U.S.C. § 160(b) (1934)), because there is no specific statute of limitations otherwise applicable. This was a

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1. On the day the trial commenced Respondents were permitted to file an amended answer raising, for the first time, a statute of limitations defense.

change in the law because federal courts had been applying various common law statutes. The *Del Costello* decision impacted on the post trial motions because included was the statute of limitations issue which the Court permitted the Defendants to raise the morning trial commenced. The district court issued its decision setting aside the jury verdict and dismissing the Complaint based upon the statute of limitations in September, 1983. Thus, the Appellants became a victim of the lower courts inaction because their verdict was set aside by "new" law ultimately found *not* to bar their claim. This initial fifteen month delay ultimately became a seven year delay which finally resulted in a non-suit.

The Petitioners appealed this decision to the Sixth Circuit Court of Appeals and the Respondents cross appealed. A decision in favor of the Petitioners was rendered by the Sixth Circuit Court of Appeals on July 18, 1985 remanding the matter back to the lower court. The remand was for the purpose of determining whether the action of the Petitioners, in filing grievances which were never processed by the Union, was in good faith and thus tolled the running of the statute of limitations. The specific applicable language is:

> The Model Makers case is remanded to the district court for a determination whether Plaintiffs' January, 1981 attempt to file grievances prevented accrual of their claim until that time.

(App. 59a).

If the lower court found that issue favorable to the Petitioners then the Court of Appeals determined that there was sufficient evidence to support the jury verdict in favor of the Petitioners:

> In the Model Makers case, plaintiffs properly produced evidence that General Motors agreed to immediately reclassify the plaintiffs and failed to do so and the union represented the Model Makers in an arbitrary or perfunctory manner; we reject defendants' contention that arbitrariness is an inappropriate standard to apply to union conduct when negotiating contract provisions. The evidence of a claim was far from uncontroverted, but it was sufficient to sustain a jury verdict.

(App. 58a).

The remand occurred July 22, 1985. The lower court instructed briefs to be filed to address the issues and the matter again remained "pending" before the district court from July, 1985 until July, 1988 (three years) until the court made its Decision and Entry Affirming the Verdict of the Jury. (App. 39a).

For three years Petitioners waited for a ruling from the court on the remanded question. When it came, for the second time the Petitioners had prevailed on a jury verdict and for the second time the matter was referred to the Magistrate to assess damages and affix seniority rights and obligations of the parties. The matter went before the Magistrate to determine damages, seniority rights, and other relief to which Petitioners were entitled and the trial to the Magistrate (sitting without a jury) on the damages issue began November 13, 1989 and concluded December 12, 1989. In July, 1990 the Magistrate Judge issued a Report and Recommendation finding, among other things, that the jury did not decide the issues of whether the Model Makers were contractually entitled to work during the tear down or whether

any particular Petitioners were improperly reclassified[2] and the Court should, therefore, find that General Motors did not violate the shut down agreement by failing to work the Model Makers during the tear down period. The Magistrate Judge also assessed damages and made other recommendations concerning relief in that Report and Recommendation.

Objections to this Report were filed by all parties by September 18, 1990. The Magistrate Judge's Report and Recommendation was re-committed to the Magistrate Judge for determination of objections. The Magistrate Judge issued a Supplemental Report and Recommendation adhering to his prior Report and Recommendation without comment on March 25, 1991. By April 8, 1991 all parties had again filed objections to the Supplemental Report and Recommendation.[3]

On May 28, 1991, Respondents filed a renewed Motion for Judgment Notwithstanding the Verdict, relying on this Court's decision in *Airline Pilot's v. O'Neill,* 111 S. Ct. 127 (1991). In December, 1991 the Magistrate Judge issued a new Report and Recommendation recommending that the Motion of the Respondents be sustained. This Report and Recommendation was again re-committed by the Court to the Magistrate Judge who, on June 16, 1992 issued a Report and Recommendation recommending that the Respondents' Motion for Judgment Notwithstanding the Verdict be granted and the Complaint be dismissed with prejudice. After appropriate objections were filed by all parties on December 31, 1992, ten and one half years after the first jury verdict, the Petitioners were again non-suited

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2. This finding is in direct contradiction to the above quoted language from the Court of Appeals.

3. These Objections to this Report and Recommendation have never been ruled on due to the subsequent rulings on the renewed motion.

because the lower court considered that there was no "law of the case". The Court concluded that the *Airline Pilot's* case changed the law and then applied this "change" retroactively to the substantive issues of this case, thus overruling issues which had previously been affirmed by the Sixth Circuit Court of Appeals in 1985.

On appeal, the Sixth Circuit Court of Appeals affirmed the decision of the district court.

The Court of Appeals was of the opinion that there was no law of the cause because there was no final judgment as defined by Fed. R. Civ. P. 50(b). Thus, the motions attacking a jury verdict rendered eleven years earlier (a verdict which had already been reviewed and affirmed by the Court of Appeals) was appropriate because that verdict had not become final. It was also the opinion of the Sixth Circuit Court of Appeals that its remand in 1985 did not operate to reinstate the July 26, 1982 judgment, a conclusion difficult to comprehend since this Court reached the conclusion that if the remanded issue (the 1981 attempt to file grievances) was found in favor of the Petitioners then there was sufficient evidence to support the jury verdict in favor of the Petitioners.

On the other issues, the Court of Appeals did agree that the question of whether there was a final judgment was of significance only if the Court's decision in *Airline Pilot's* announced a new rule or a change in the law. The Sixth Circuit Court of Appeals concluded that *Airline Pilot's* does set forth a change of law, which permitted the Court of Appeals to affirm the lower court's decision[4]. The Sixth Circuit Court of Appeals

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4. Neither the lower court nor the Court of Appeals addressed Petitioners right to a new trial if the "new" law required additional evidence. Since the basis for setting aside the judgment is a result of the weighing of the evidence, Petitioners should be given the opportunity of presenting evidence to meet the new law.

addressed the Seventh Amendment issue only tangentially, making the observation that the delays were due in part to the parties' decisions so that "any injustice or outrage is self inflicted" and that "both sides have nobody to blame but themselves". (App. 14a). The record in this case as above narrated speaks to the contrary.

REASONS FOR GRANTING THE WRIT

The judgment of the United States Court of Appeals for the Sixth Circuit should be reviewed by this Court because it brings to this Court three unique questions that should be addressed. Research does not disclose that any of these questions have previously been specifically addressed by this Court. These questions are:

1. Does this Court's decision in *Airline Pilot's* express a contrary view of the law applicable to § 301 cases?

2. When does a judgment on the liability issues in a bifurcated jury trial become the law of the case?

3. When does judicial delay become so significant that it adversely affects the rights of the parties?

I.

THE *AIRLINE PILOT'S* ONLY CLARIFIED THE LAW

When this Court announced its decision in *Airline Pilot's* it began with the following statement:

> We granted certiorari to *clarify* the standard that governs a claim that a union has breached its duty of fair representation in its

> negotiation of a back-to-work agreement terminating a strike. We hold that the rule announced in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) — that a union breaches its duty of fair representation if its actions are "arbitrary, discriminatory, or in bad faith" — applies to all union activity, including contract negotiation.

Airline Pilot's v. O'Neill, 499 U.S. 65, 67 (1990). (Emphasis added).

In addition to citing *Vaca*, the Court also drew upon *Ford Motor Company v. Huffman*, 345 U.S. 330 (1953), to reaffirm that the tri-pronged elements of a breach of duty of fair representation will remain arbitrary, discriminatory or bad faith conduct of a union.

This Court also made it clear that the *Airline Pilot's* decision was only clarifying the language applicable to the "arbitrary" prong of the tripartite standard.

> We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside "a wide range of reasonableness" [cite omitted] as to be irrational.

Id. at 67.

> We are persuaded, however, that the Court of Appeals further refinement of the arbitrariness component of the standard authorizes more judicial review of the

> substance of negotiated agreements than is consistent with national labor policy.

Id. at 77.

Clearly mindful of this Court's language that the arbitrariness standard was merely being "clarified" the Sixth Circuit Court of Appeals attempted to rationalize its refusal to follow this instruction by arguing:

> While the Court characterized its decision in *Airline Pilot's* as "clarifying" the duty of fair representation standard, this Court saw it in *Ackley v. Local 337, International Brotherhood of Teamsters*, 948 F.2d 267 (6th Cir. 1991), as enough of a change in existing circuit law to warrant vacating a decision it had held for rehearing, pending the outcome of *Airline Pilot's.*

(App. 11a).

The Sixth Circuit's analysis in the above quoted section of its decision fails to properly apply *Airline Pilot's* in two significant ways. First of all, it applies the *Airline Pilot's* decision across the board to the "duty of fair representation standard" rather than to just the arbitrary prong of that standard. Secondly, it recharacterizes this Court's statement it was "clarifying" the arbitrary prong of the standard and defines this Court's language as expressing "a change in existing circuit law".

In addition to suffering from the misapplication of *Airline Pilot's* by the Sixth Circuit, Petitioners submit that decisions of both the Sixth and Seventh Circuit Courts of Appeal demonstrate conflict and confusion among, between and within the Circuits.

For example, the Sixth Circuit now applies *Airline Pilot's* across the board to all three prongs of the breach of duty of fair representation claim (*See Nida v. Plant Protection*, 7 F.3d 522 (1993)) and dissent of Judge Boggs in *Ackley, infra* at 268; or, maybe in the Sixth Circuit whether *Airline Pilot's* applies to just the arbitrary prong or to all three prongs is determined by which panel of judges is assigned to the case. *See Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573 (6th Cir. 1994).

The Seventh Circuit's recent decision in *Rakestraw v. United Airlines, Inc.*, 989 F.3d 947 (7th Cir. 1993), an en banc decision, shows the same lack of understanding and consistency of application. In *Rakestraw* two judges (Judges Flaum and Ripple) dissented from the application of *Airline Pilot's* by the majority. The dissent there pointed out that the majority opinion deviated from the established law that this Court has set for § 301 cases. The deviation occurred where the Court failed to evaluate the three pronged test separately. *Id.* at 945. Now, in *Nida infra*, *Black infra*, and in the instant case the Sixth Circuit has joined the Seventh Circuit in misapplying *Airline Pilot's*. As pointed out in the *Rakestraw* dissent the Seventh Circuit (and now the Sixth Circuit) is in conflict with other circuits by deviating from the established law of the Supreme Court. *Id.* at 947.

Thus, whether *Airline Pilot's* represents new law and whether it applies to only one or all three prongs of the breach of duty standard is not controlled by the law as established by the Supreme Court, at least in the Sixth and Seventh Circuits, but is a function of which panel of judges is assigned to hear the case. The failure of a circuit court to apply the law established by the Supreme Court requires vacating and remanding the action, which the Court did for the Tenth Circuit in *Le'Mon v. National Labor Relations Board*, 499 U.S. 933 (1991).

Petitioners submit that the confusion and conflict between

the Circuits and among the judge's within the Circuits commends this case for certiorari to clarify once and for all the application of the standard applicable to § 301 cases.

II.

THE FINAL JUDGMENT OF THE LIABILITY PHASE

Petitioners' position on this issue is quite simple. This Court should also establish the principle that a verdict rendered in the liability phase of a bifurcated trial is final for all purposes, when a judgment on the verdict is recorded. Petitioners submit that a jury verdict recorded July 26, 1982 that is sufficiently final to be appealed and reaffirmed by the Court of Appeals is, therefore, sufficiently final to become the law of the case. As a result, motions which are to be filed within ten days after the entry of judgment are not timely filed when filed three years later. "Changes in the law" which are announced subsequent to the filing of judgments on the liability issues in bifurcated cases cannot be used to intrude into the finality of that judgment. *See Arizona v. California,* 460 U.S. 605 (1983) and *White v. Murtha,* 377 F.2d 428 (5th Cir. 1968).

Even the Court of Appeals acknowledges that there is a judgment for the purposes of finality under Rule 50(b) if an appeal lies therefrom. (App. 8a). This case was appealed. The Respondents cross-appealed attacking the sufficiency of the evidence to support a jury verdict. The Court of Appeals, in 1985, expressly dealt with that issue finding that there was sufficient evidence to support the jury verdict.

The point of departure between the instant case and the authorities relied upon by the Court of Appeals is that there was a final judgment issued in this case on July 26, 1982. (App. 67a). That final judgment was reaffirmed by the Court of Appeals and

the district court in subsequent proceedings. It should not require the filing of a second final judgment order to establish the law of the case as to the liability phase of the bifurcated trial.

It is submitted that this Court should grant certiorari to establish a clear statement of federal law applicable to bifurcated trials and to correct the error of the court below in the instant case. Such a rule will prevent other parties similarly situated (who consent to bifurcated trials) from becoming victimized where intervening delays, whether due to judicial inaction or the result of regular court process, subject a prevailing party to being non-suited by a subsequent change in the law.

III.

THE SEVENTH AMENDMENT ISSUE

Petitioners herein contend that because of the judicial delays which have occurred in this case, they have been denied their right to a trial by jury. Their right to a trial by jury was afforded to them in June, 1982.[5] Judicial delays (that is the inaction of the district court on the occasions identified in the statement of the case) served to deny the prevailing parties their right to trial by jury. It wastes the time and energy, not only of the parties, but also the jurors who serve at a great sacrifice. There was a fifteen month delay between the entry of the judgment in favor of the Petitioners in July, 1982 and the September, 1983 decision of the district court on the Motions for a New Trial and Judgment Notwithstanding the Verdict. There was a three year delay between the time the Court of Appeals remanded the case back to the district court and the time the district court issued its decision on the remanded issue. There were delays of six to twelve months in the committing and re-committing Reports and

5. This is a federally recognized and protected right. *See Logan v. Zimmerman*, 455 U.S. 422 (1981).

Recommendations back to the Magistrate and a delay between the time of the Report and Recommendation of the Magistrate and the final decision of the district court on the Magistrate's Report and Recommendation. Quite contrary to the suggestion of the Court of Appeals, none of the above stated delays were instigated by the parties to the litigation, unless one construes the filing of an Answer and a Complaint as instigating judicial delays.

Judicial delays and their tragic consequences as demonstrated by the instant case have become a matter of increasing concern. In a recent law review article, Professor John E. Rumel, The Hourglass and Due Process, 26 U. San Francisco L. Rev. 237 (Winter, 1992), pointed out that in addition to the named parties there is an unnamed party in every law suit and that unnamed party is the public. He pointed out, drawing from some judicial authorities who were concerned about the speedy resolution of civil disputes, that public resources can be squandered if judicial proceedings are allowed to proliferate for unreasonable periods of time. The publics belief in the integrity of the judicial system becomes severely challenged if there is no definite and ascertainable point of time when litigation shall become ended. Case Note, Notice of Entry of Final Judgments, 58 Cin. L. Rev. 1043, 1060 (1990).

Of course, this issue does not have to be reached if the Court grants certiorari on the other two questions presented. This issue is, nevertheless, important and significant to all citizen litigants, witnesses and jurors. A judicial process which demands the timely performance of functions by jurors, witnesses and parties but then itself fails to perform its functions in a reasonable and timely manner justly subjects itself to questions of its fairness, impartiality, trust and judiciousness. These criteria are necessary for a social institution, charged with providing an accessible means of resolving disputes, to earn and retain the respect of the citizens it serves, and to properly fulfill its function.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MARCH 31, 1995

NOT RECOMMENDED FOR PUBLICATION

Nos. 93-3184/3245/3645/3697

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ASSOCIATION OF FRIGIDAIRE MODEL MAKERS, *et al.*,

Plaintiffs-Appellants,

v.

GENERAL MOTORS CORP. and INTERNATIONAL UNION OF ELECTRICAL, RADIO, & MACHINE WORKERS, LOCAL 801, AFL-CIO-CFC,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE: MARTIN and BOGGS, Circuit Judges; and FORESTER, District Judge*

PER CURIAM The plaintiffs ("the Model Makers") are a

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* The Honorable Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation.

group[1] of skilled tradesmen formerly employed as model makers by the now-defunct Frigidaire Division of defendant General Motors Corporation ("GM"). They appeal the district court's entry of judgment as a matter of law dismissing their hybrid § 301 breach of agreement/duty of fair representation claim against GM and co-defendant International Union of Electrical, Radio & Machine Workers, Local 801, AFL-CIO-CLC ("the Union").

The Model Makers make three arguments on appeal: (1) Federal Rule of Civil Procedure 50(b) precludes consideration of the defendants' renewed motion for judgment as a matter of law; (2) the district court violated the "law of the case" by applying *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65 (1991); and (3) the district court deprived the plaintiffs of due process by denying them expeditious resolution of this case. We reject these arguments and affirm the district court's dismissal of this case.

I.

This appeal comes to the court with a tortured past.[2] Briefly,

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1. There seems to be a question of how many people are suing the defendants. Petitioners refer to forty-nine plaintiffs, respondents state that there are forty-eight, and our count of those listed in the complaint is fifty-two (including the estates of eight who have died).

2. After the district court entered the final judgment on its docket sheet on December 31, 1992, plaintiffs filed their first notice of appeal (No. 93-3097) on January 28, 1993, within the thirty days allowed by Fed. R. App. P. 4(a)(1). However, they improperly identified the party taking appeal as "Association of Model Makers, *et al.*" instead of listing each party individually. On February 16, 1993, plaintiffs moved for an extension of time to appeal (No. 93-3184) pursuant to Fed. R. App. P. 4(a)(5), which permits such motions within *sixty* days of a final judgment "upon a showing of excusable neglect or good cause." The next day, the

(Cont'd)

this suit arose out of the decision by GM in 1979 to sell its Frigidaire Division and to convert two Dayton, Ohio, Frigidaire production plants for use by its Chevrolet division.[3] Almost all employees at the Frigidaire plants were to be laid off during a two-year transition period.

The defendants agreed to employ in the Chevrolet plant, with unbroken seniority, those Frigidaire workers who were union members. Most of the skilled tradespersons from the Frigidaire facilities could have found equivalent positions at Chevrolet, but since Chevrolet had relegated all modeling activity to its facility in Warren, Michigan, the Model Makers were no longer needed in Dayton. The defendants informally agreed to establish a joint union-management committee to

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(Cont'd)
district court granted the extension in a notation order. Defendants moved for relief from this order since they were not given an opportunity to contest plaintiffs' motion. Plaintiffs again moved for an extension of time to appeal (No. 93-3245) on February 26.

In an order dated March 18, 1993, the district court vacated its notation order *sua sponte*, thus mooting defendants' motion for relief. On May 28, 1993, the court granted the extension of time to appeal that was sought by plaintiff's motion of February 26, giving plaintiffs ten days to file notice of appeal; they did so on June 2, 1993 (No. 93-3645). Defendants appealed the court's extension on June 18 (No. 93-3697), arguing that there was neither good cause or excusable neglect.

We find no abuse of discretion, and agree completely with the district court's reasoning in its May 28 decision. Since both of plaintiff's motions were within sixty days of the final judgment, we have jurisdiction to hear this appeal.

3. The opinion in *Adkins v. International Union of Elec., Radio & Mach. Workers*, 769 F.2d 330 (6th Cir. 1985), gives a more detailed history of this litigation.

reclassify the Model Makers into another skilled trade classification, which would make them eligible for jobs in Dayton.

Union members ratified the plant closing agreement in February of 1979, and layoffs began shortly thereafter. During the transition period, the joint committee successfully reclassified all model makers at the Dayton plants, but these reassigned workers were not given seniority credit for their time working at Frigidaire. On June 24, 1981, the plaintiffs sued, alleging that GM had breached the plant-closing agreement, in violation of the Labor Management Relations Act, 29 U.S.C. § 185, and that the Union had breached its duty of fair representation by permitting the plaintiffs to be reclassified without retaining their seniority rights.

The district court bifurcated the liability and damages issues, and the liability question was tried before a jury. On June 23, 1982, the jury rendered a verdict for the Model Makers, and the court entered judgment "for the Plaintiffs and against the defendants as to liability only" on July 26, 1982.

Following the jury verdict, the defendants moved for judgment notwithstanding the verdict. On September 21, 1983, the trial court held that the statute of limitations barred the Model Makers' claims and granted the defendants' motion.[4] The plaintiffs appealed the decision to this court, and the defendants cross-appealed, arguing that the Model Makers had failed to produce sufficient evidence of bad faith or arbitrary conduct by the Union or breach of the plant-closing agreement by GM.

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4. *Association of Frigidaire Model Makers v. General Motors Corp.*, 573 F. Supp. 236 (S.D. Ohio 1983).

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In *Adkins v. International Union of Elec., Radio & Mach. Workers, Local 801*, 769 F.2d 330 (6th Cir. 1985), another panel of this court agreed that a six-month statute of limitation applied, but remanded the case for a determination of when the plaintiffs' cause of action accrued. The court also rejected the defendants' cross-appeal:

> A hybrid section 301/unfair representation claim requires the plaintiff to show that the employer breached the collective bargaining agreement and that the union acted in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation. [*DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 163-64 (1983)]. . . . [P]laintiffs properly produced evidence that [GM] agreed to immediately reclassify the plaintiffs and failed to do so and that the union represented the model makers in an arbitrary or perfunctory manner; *we reject defendants' contention that arbitrariness is an inappropriate standard to apply to union conduct when negotiating contract provisions.* The evidence of a claim was far from uncontroverted, but it was sufficient to sustain a jury verdict.

Adkins, 769 F.2d at 336-37 (emphasis added).

Upon remand, the district court concluded that the plaintiffs' claim accrued late enough to make its suit timely, and entered an order on July 1, 1988, captioned as follows:

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DECISION AND ENTRY AFFIRMING THE VERDICT OF THE JURY; JUDGMENT ENTERED IN FAVOR OF THE PLAINTIFFS AND AGAINST THE DEFENDANTS; ORDER OF REFERENCE TO UNITED STATES MAGISTRATE TO ASSESS AMOUNT OF DAMAGES AND TO AFFIX THE SENIORITY RIGHTS AND OBLIGATIONS OF THE PARTIES, PURSUANT TO THE JURY VERDICT.

In the order, the court concluded that "the verdict of the jury must be affirmed and that judgment must *ultimately* be entered in favor of the Plaintiffs and against the Defendants." (emphasis added).

With the issue of damages still pending before the magistrate judge, the defendants, on May 28, 1991, renewed their motion for judgment notwithstanding the verdict, (now designated as a motion for judgment as a matter of law). They asserted that in *Air Line Pilots Ass'n Int'l v. O'Neill,* 499 U.S. 65 (1991), the Supreme Court had articulated a new definition of arbitrary union conduct in hybrid § 301 suits, and that the plaintiffs had not satisfied this standard. On December 31, 1992, the district court agreed and entered judgment in favor of the defendants. This appeal followed.

II

The standard for reviewing a district court's ruling on a motion for judgment as a matter of law is identical to that governing a motion for judgment notwithstanding the verdict. *Black v. Ryder/P.I.E. Nationwide, Inc.,* 15 F.3d 573, 583 (6th Cir. 1994):

> [T]his court reviews a motion for judgment as a matter of law using the same standard used by the district court. The court should not weigh the evidence, evaluate the credibility of witnesses, or substitute its judgment for that of the jury; rather, it must view the evidence in the light most favorable to the party against whom the motion is made, and give that party the benefit of all reasonable inferences.

Ibid. (citations omitted). Accordingly, the motion should be sustained only "[i]f the evidence 'points so strongly in favor of the movant that reasonable minds could not come to a different conclusion.' " *Marsh v. Arn*, 937 F.2d 1056, 1060 (6th Cir. 1991), *quoting Ratliff v. Wellington Exempted Village Schools Bd. of Educ.*, 820 F.2d 792, 795 (6th Cir. 1987).

III.

The Model Makers argue that the district court's order granting judgment as a matter of law violated Rule 50(b)[5] because the defendants renewed their prior motion on May 28, 1991, almost nine years after the district court originally entered judgment for the plaintiffs on July 26, 1982. Alternatively, they argue that the district court's July 1, 1988 "decision and entry" constituted a judgment in the plaintiffs' favor, and that the defendants' May 1991 renewed motion was not filed within 10 days of this judgment. They urge this court to find that there was a

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5. A motion for judgment as a matter of law, having been made and denied at the close of all the evidence, "may be renewed by service and filing not later than 10 days after entry of judgment." Fed. R. Civ. P. 50(b).

judgment outstanding when the defendants filed their May 1991 motion, because for the court to hold the trial record open for nine years would be "patently ludicrous, manifestly unjust, and probably a denial of due process." Thus, the plaintiffs' timeliness challenge hinges upon whether the district court had ever entered a judgment sufficient to start the running of the ten-day limitations period of Rule 50(b).

We hold that there has not been such a judgment in this case. A jury finding of liability is not a final judgment for the purposes of Federal Rule of Civil Procedure 50(b). The federal rules define "judgment" to include "a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). In addition, "[e]very judgment shall be set forth on a separate document . . . [and] is effective only when so set forth and when entered as provided in Rule 79(a) [into the civil docket]." Fed. R. Civ. P. 58.

This court has observed that a district court's filing of a memorandum opinion does not constitute a judgment, and that the time limitations for post-judgment motions do not begin to run until "a separate document setting forth the judgment in compliance with Rule 58 [has been] entered." *Jetero Constr. Co., Inc. v. South Memphis Lumber Co.*, 531 F.2d 1348, 1351 (6th Cir. 1976). Further, a court's jurisdiction continues "[u]ntil the entry of its judgment disposing of the litigation," and a court retains the "inherent power to correct any error of its own which it may have previously made. . . ." *Ibid.* (citations omitted).

A judgment in a bifurcated proceeding is not final until both liability and damages have been fully resolved. *Brown v. United States Postal Serv.*, 860 F.2d 884, 886 (9th Cir. 1988) (concluding that "[a] district court judgment of liability is not a final judgment where it remains for the district court to assess damages or

adjudicate other claims for relief"); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 353 (3d Cir. 1981) (holding that the term "judgment" in Rule 50(b) is limited to *final* judgments), *cert. denied*, 455 U.S. 1017 (1982); *Warner v. Rossignol*, 513 F.2d 678, 684 n.3 (1st Cir. 1975) (rejecting in a bifurcated trial "plaintiff's contention that a new trial motion with respect to liability had to be filed within ten days of entry of the interlocutory judgment . . . [because] '[t]he judgment' referred to in [Rule 59(b)] is the final judgment that will be entered after damages are assessed.").

Despite the passage of almost nine years from the jury's verdict, there simply was no outstanding judgment on record at the time the defendants filed their renewed motion. The remand from this court did not order reinstatement of the July 26, 1982, judgment in the plaintiffs' favor, but instead required "a determination of whether the plaintiffs' January 1981 attempt to file grievances prevented accrual of their claim until that time." *Adkins*, 769 F.2d at 337. Nor was the district court's July 1, 1988, "DECISION AND ENTRY" a final judgment for this purpose: the document was in the form of a memorandum opinion that specifically stated that "a judgment *must ultimately* be entered in favor of the plaintiffs." In addition, no separate document entering judgment pursuant to this memorandum opinion was ever filed as required by Fed. R. Civ. P. 58. Accordingly, the district court was correct in concluding that "as of the time of the filing of the motion under discussion, there was no valid judgment in force in this litigation."

IV

The absence of a final judgment is of consequence only if the Supreme Court's decision in *Air Line Pilots* set forth a new rule. Thus, the district court could not revisit its prior determination

that the union's conduct breached its duty of fair representation without violating the law already established in this case. This court has observed that the law of the case "applies with equal vigor to the decisions of a coordinate court in the same case and to a court's own decisions." *United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990).

In *Arizona v. California*, 460 U.S. 605, 618 (1983), the Supreme Court noted that "the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Nonetheless, "[l]aw of the case directs a court's discretion, it does not limit the tribunal's power. . . . [I]t is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Id.* at 618 & n.8 (citations omitted). Therefore, the "law of the case" doctrine precludes reconsideration of settled issues unless a "controlling authority" sets forth a "contrary view of the law." *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1968).

The plaintiffs' position rests entirely on their characterization of the Supreme Court's intervening decision in *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65 (1991), as a mere clarification of the law, rather than a contrary decision of law. In *Air Line Pilots*, the Court considered the case of striking airline pilots who, by virtue of the back-to-work agreement negotiated by their union, received less favorable treatment than if they had unilaterally agreed to return to work. 499 U.S. at 79. The Court held that the standard for determining whether a union breaches its duty of fair representation in contract negotiations was the same as that for other union conduct: "a union breaches its duty . . . if its actions are either 'arbitrary, discriminatory, or in bad faith.' " *Id.* at 67. The Court's definition of "arbitrary" afforded great deference to the union:

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> Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. . . . [T]he final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' that it is wholly 'irrational' or 'arbitrary.'

Id. at 78 (citation omitted).

While the Court characterized its decision in *Air Line Pilots* as "clarifying" the duty of fair representation standard, this court saw it in *Ackley v. Local 337, Int'l Brotherhood of Teamsters*, 948 F.2d 267 (6th Cir. 1991), as enough of a change in existing circuit law to warrant vacating a decision it had held for rehearing, pending the outcome of *Air Line Pilots*. The *Ackley* case involved an employer's decision to merge the employees and functions of two separate facilities into a new facility. Different union locals had represented employees of the two original facilities, but only one was allowed to represent the combined workforce. The appointed local negotiated full seniority for its members, but "endtailed"[6] the seniority of the other local's workers, who were on layoff status when the facilities merged. A jury found that the local had breached its duty of fair representation to the endtailed employees.

In this court's vacated opinion, the majority held that the

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6. The term "endtailing" refers to the practice, when two locals merge, of giving less seniority to some employees.

plaintiffs had presented sufficient evidence of hostility by the local to sustain the jury verdict. *Ackley v. Local 337, Int'l Brotherhood of Teamsters*, 910 F.2d 1295, 1300 (6th Cir. 1990) ("*Ackley I*"). Judge Nelson dissented on the grounds that there was nothing irrational or hostile about the local's action, and that the company and the union, faced with a shrinking market, had made a difficult decision.[7] Under such circumstances, he reasoned that the fact that some employees received full seniority while others were endtailed was not a breach of the union's duty to represent the workers fairly:

> This is not a case where the union was motivated to discriminate against one faction on racial grounds . . . [or] because that group had resisted unionization. . . . [Nor is it] a case where a motive to discriminate unfairly and in bad faith could be inferred from the fact that the union's position was "unsupported by any rational argument whatsoever." . . . [T]he bargaining position taken by the union . . . was supported by an eminently rational argument.

Id. at 1307-08 (Nelson, J., dissenting) (citations omitted).

Following the Supreme Court's decision in *Air Line Pilots*, Judge Nelson's dissenting opinion was summarily adopted as the majority opinion:

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7. "Because there were not enough jobs to go around . . . some employees who wanted to work there and who felt they had legitimate claims on jobs at the facility were inevitably going to lose out. It was up to the union and the company to decide, through the collective bargaining process, who the individual winners and losers would be in this zero-sum game." *Id.* at 1307 (Nelson, J., dissenting).

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> The *O'Neill* case has now been decided. It teaches us that what a union does in its negotiating capacity is not actionable absent proof of bad faith, discrimination, or behavior so unreasonable as to be irrational. . . . Having reexamined the record of the instant case in light of *O'Neill*, we are satisfied, essentially for the reasons stated by Judge Nelson in the dissenting opinion . . . that there is no basis on which the jury could properly have found the union's conduct to have been arbitrary, discriminatory, or irrational.

Ackley v. Local 337, Int'l Brotherhood of Teamsters, 948 F.2d 267 (6th Cir. 1991) (citation omitted).

This court agrees that *Air Line Pilots* enunciated a "contrary view of the law" applicable to this case. Otherwise, there would have been no need for the *Ackley I* court to reverse itself. Given that the district court is not only constrained by the law of the case, but is also obligated to follow controlling authority, adopting the plaintiffs' position would require the district court to ignore a decision of the Supreme Court, which clearly "would work a manifest injustice." *Arizona v. California*, 460 U.S. at 618 n.8 Admittedly, a district court will only rarely be forced to vacate a jury's verdict, but that makes it no less appropriate in particular circumstances. The parties' own actions in prolonging the damages portion of the litigation only increased the possibility of an intervening change in the law. Based on the foregoing, the plaintiffs' contention that the district court's decision violated the law of the case is without merit.

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V

The Model Makers argue that the passage of more than a decade since their complaint was filed violates their trial rights under the Seventh Amendment and Federal Rule of Civil Procedure 1, and that the protracted nature of the proceedings has denied them due process. The defendants counter that the plaintiffs should not prevail simply because of the length of the proceedings. Moreover, the defendants maintain that most of the delays in this case are directly attributable to the plaintiffs, and that the plaintiffs have identified no instance in which the defendants engaged in dilatory tactics.

The Seventh Amendment does not address the speed with which civil litigation must proceed. It would be unprecedented to read it as authorizing a judgment in the plaintiffs' favor merely because it took the court system thirteen years to dispose of their claim finally; the defendants have been equally hindered. This unusually long delay was due in part to the parties' own decisions, so that any injustice or outrage is self-inflicted; the primary culprit is the parties' inability to conclude the damages segment of the trial for almost thirteen years. Both sides contributed to, as well as benefitted from, the delay: six years of the litigation was spent adjudicating a threshold issue of the statute of limitations, a ruling that enabled the plaintiffs to proceed to trial. In short, both sides have nobody to blame but themselves.

For the foregoing reasons, we put this litigation to final rest and AFFIRM the district court's judgment for the defendants.

APPENDIX B — DECISION AND ENTRY SUSTAINING DEFENDANTS' RENEWED MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO FILED DECEMBER 31, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-3-81-343

ASSOCIATION OF FRIGIDAIRE MODEL MAKERS, et al.

Plaintiff

vs.

GENERAL MOTORS CORPORATION, et al.

Defendant

DECISION AND ENTRY SUSTAINING DEFENDANTS' RENEWED MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (DOC. 196); MAGISTRATE'S REPORT AND RECOMMENDATIONS (DOC. 202) ADOPTED IN THEIR ENTIRETY; CERTAIN MATTERS DEEMED MOOT; JUDGMENT TO DEFENDANTS AND AGAINST PLAINTIFFS; TERMINATION ENTRY

The renewed motion of the Defendants, seeking an order of the Court granting judgment notwithstanding the verdict (construed as a renewed motion for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50 (b)), based upon the intervening decision of the United States Supreme Court in *Airline Pilots*

Association International v. O'Neill, et al., 499 U.S. __, 113 L. Ed. 2d 51, 111 S.Ct. 1127 (1991) (Doc. #196), is sustained. Judgment will be entered in favor of the moving Defendants and against the Plaintiffs herein, thus terminating this litigation.

This Court has done a thorough review of the memoranda submitted both in support of and in opposition to the Defendants' Renewed Motion for Judgment Notwithstanding the Verdict (Doc. #196, 198 and 199), the Report and Recommendation of the United State Magistrate Judge (Doc. #202), which recommended to this Court the granting of said Renewed Motion or Judgment Notwithstanding the Verdict, and the memoranda filed both in support of and in opposition to the Magistrate Judge's Report and Recommendations (Docs. 203, 206, 208 and 213). This Court has conducted a thorough *de novo* review of the entirety of the file in Clerk of Court's office and of the transcript of the trial which led to a finding of liability in favor of the Plaintiffs and against the Defendants herein. While it seems totally anti-climactic to end a case with this lengthy a procedural history (a multi-week trial on the issue of liability, a month long hearing on the issue of the remedy and at least one trip to the Court of Appeals) on this note, this Court is satisfied, to an absolute degree of certainty, that the Supreme Court's decision in *Airline Pilots Association v. O'Neill*, a decision which intervened between the finding of liability and the filing of the instant motion, is both applicable and dispositive of this litigation. Moreover, this Court is satisfied that the Supreme Court's pronouncement in *O'Neill* did more than merely explain or refine a standard of long duration; the holding in *O'Neill* set forth, in this Court's opinion, a new standard applicable to claims of breach of the duty of fair representation, a standard which the Plaintiffs in this litigation have failed to meet.

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Certainly the *denouement* of litigation this important and this protracted, litigation that has already seen in the neighborhood of 220 docket entries, ought to end with nothing less than a ringing exposition on the applicable law. However, this Court has always believed in the wisdom of not "reinventing the wheel, unless absolutely necessary." In this Court's opinion, while it could not better the rationale set forth by the United States Magistrate Judge, in his filing of December 30, 1991 (Doc. #202), which recommended the granting of the Defendant's Renewed Motion for Judgment Notwithstanding the Verdict, the Court will, in addition to the reasoning and citations of authority set forth in the Report and Recommendations of the Magistrate Judge, add the following non-exclusive observations.

A. *The Motion is Timely.*

Rule 50(b), providing for post-trial renewed motions for judgment as a matter of law (the successor to the post trial verdict motion for judgment notwithstanding the verdict) clearly sets forth that such a motion must be filed "not later than 10 day after entry of judgment."[1] It is crystal clear that, as of the time of the filing of the motion under discussion, there was *no* valid judgment in force in this litigation. Judgment, within the meaning of the rule, means final judgment. *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3rd Cir. 1981), *cert. den.*, 455 U.S. 1017, 102 S.Ct. 1711 (1982). Assuming, *arguendo*, that this Court had attempted to journalize, as a judgment entry, the jury's verdict in favor of the Plaintiffs on the issue of liability, same would have been an invalid or non-final judgment, absent a Rule 54 certification,

1. The motion at issue was filed on May 28, 1991, prior to the effective date of Rule 50(b) on December 1, 1991, a time when the term "judgment notwithstanding the verdict" was proper. However, the time for filing of said motion was identical to that applicable to post trial verdict motions for judgment as a matter of law.

since it would have purported to grant judgment on the issue of liability only, without adjudication of damages. The only judgment ever entered in this case, prior to the filing of the motion at issue herein, was the judgment granted by this Court upon the Defendant's motion for judgment notwithstanding the verdict, on September 21, 1983 (Docs. #74 and 75). That judgment was vacated by the Court of appeals, which remanded the matter to this Court, for a specific factual finding and inquiry, upon which the Court's conclusion that the statute of limitations barred the Plaintiffs' claims had been based. On July 1, 1988, this Court reinstated the verdict of the jury, concluding "that judgment must *ultimately* [meaning after the determination of damages and any other aspects of the remedy] be entered in favor of the Plaintiffs and against the Defendants." A referral to the Magistrate Judge for proceedings related to damages, et cetera, was made at that time. No judgment has been entered subsequent to this Court's reinstatement of the jury verdict.

B. *O'Neill is "Controlling Authority" taking a "Contrary View of the Law."*

The Supreme Court granted certiorari in *O'Neill* to clarify that the standard of *Vaca v. Sipe*, 386 U.S. 171, 87 S.Ct. 903 (1967) — that a union breaches its duty of fair representations if its actions are either "arbitrary, discriminatory or in bad faith"[2] — applies to *all* union activity, including contract negotiation. All union activity includes both the negotiation of a contract and its implementation or execution. This clarification was unnecessary, insofar as the Sixth Circuit or this Court was concerned. Both courts had assumed the blanket application of *Vaca v. Sipes* to all aspects of contract formation and execution in prior rulings in this case.

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2. *Vaca* speaks to actions "either arbitrary, discriminatory or in bad faith." However, only the "arbitrary" component is at issue herein.

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One aspect of *O'Neill* represents a change in the law, profound enough to be both new and contrary authority to the progeny of *Vaca*. Prior to *O'Neill*, the union was under a duty to avoid "arbitrary" *conduct, Ruzicka v. General Motors Corp.*, 523 F.2d 306, at 309-10 (6th Cir. 1985). The focus was on the *actions* of the union without the requirement that those actions be considered in the context of other facts and circumstances existing at the time. Of course, the alleged arbitrary conduct had to result in some proximately caused damage to a union member plaintiff, but the gravamen of a claim of a breach of a duty of fair representation was on the conduct of the union officials, not on the result. In *O'Neill*, the Court stated:

> We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside "a wide range of reasonableness," . . . as to be irrational. *O'Neill*, 111 S.Ct. at 1130 (citations omitted).

> For that reason [to preserve the relationship between the court and labor unions a highly deferential, recognizing the wide latitude that negotiations need for the effective performance of their responsibilities], the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as "so far outside a wide range of reasonableness" . . . that it is wholly "irrational" or "arbitrary." *Id.*, at 1135-36 (citations omitted).

O'Neill thus introduced into the equation, in addition to the conduct of the allegedly offending union official, two factors: The end product and the context in which the allegedly offensive actions or failure to act took place. The end product must be so calamitous as to raise the inference that the conduct bringing about that end product was unreasonable, outside of a wide range of reasonable conduct, in short, irrational. The actions and the end product cannot be deemed arbitrary and irrational, as beyond the pale of reasonableness, without considering both actions *and* end product within the context of "the factual and legal landscape at the time of the union's actions."

This Court is satisfied, as it believes was the Sixth Circuit in *Ackley v. Teamsters Local 337*, 948 F.2d 267 (6th Cir. 1991),[3] that conduct that would have been proscribed as arbitrary prior to *O'Neill*, would pass muster within the meaning of the *O'Neill* redefinition of arbitrary, as behavior so unreasonable as to be irrational, and its mandate that courts consider the reasonableness of the conduct in question in light of the end result, measured by the factual and legal milieu existing at the time.

C. *The Merits of the Motion.*

In light of *O'Neill*, and the record in this case, keeping the standard of Rule 50 in mind, this Court concludes that "there is no sufficient evidentiary basis for a reasonable jury to have found [for the Plaintiffs on their claim that the union Defendants breached their duty of fair representation by conduct so unreasonable as to be wholly irrational]."

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3. The Sixth Circuit, on reconsideration in light of *O'Neill*, reversed a split decision, 910 F.2d 1295, which had held the union's conduct to be in violation of its duty of fair representation.

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D. *Certain Matters Rendered Moot.*

As a result of this decision terminating this case, the following matters are rendered moot:

(1) Objections by all parties (Docs. #177, 180 and 183) to Report and Recommendations of Magistrate Judge (Doc. #171);

(2) Objections by all parties (Doc. #192, 193 and 194) to Supplemental Report and Recommendations of Magistrate Judge (Doc. #190); and

(3) Plaintiff's Request for Attorneys Fees (Doc. #176).

Accordingly said Report and Recommendations are adopted in their entirety. The Defendants' Renewed Motion for Judgment Notwithstanding the Verdict, construed as a renewed motion for judgment as a matter of law (Doc. #196), is sustained. The Plaintiffs, having failed to sustain their burden of proof with regard to their claims against the Union Defendants, cannot, as a matter or law, prevail against the Employer. Final judgment will be entered in favor of the Defendants and against the Plaintiffs herein.

The captioned cause is ordered terminated upon the docket records of the United States District Court or the Southern District of Ohio, Western Division, at Dayton.

s/ Walter Herbert Rice
WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

Copies mailed to:

David Hall, Esq.
Joseph P. Buchanan, Esq.
Richard F. Rice, Esq.

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE FILED DECEMBER 30, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Civil Action No. C-81-343

District Judge Walter Herbert Rice
Magistrate Judge Michael R. Merz

ASSOCIATION OF FRIGIDAIRE MODEL MAKERS, et al.,

Plaintiffs,

-vs-

GENERAL MOTORS CORPORATION, et al.,

Defendants.

REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE: DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD BE GRANTED

This case is before the Court upon Defendants' Renewed Motion for Judgment Notwithstanding the Verdict (Doc. #196) which has been referred to the United States Magistrate Judge for report and recommendation pursuant to 28 U.S.C. § 636(b)(3) (Doc. #200).

Defendants have renewed their motion for judgment because they believe the law applicable to this case has been changed by

the decision of the United States Supreme Court in *Air Lines Pilots Ass'n. Intern. v. O'Neill.* 499 U.S. ___, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991). They ask this Court to apply the *Air Line Pilots Ass'n.* decision in reevaluating their motion for directed verdict as re-presented to the Court in their prior motion for judgment notwithstanding the verdict.

Effective December 1,1991, Fed. R Civ. P. 50 was amended to eliminate the terminology of "directed verdicts" and "judgment notwithstanding the verdict." The new terminology is "judgment as a matter of law." By Order of the Supreme Court adopting the rules amendments, they govern "all proceedings in civil actions then pending, insofar as just and practicable." According to the Notes of the Advisory Committee on Rules, new Rule 50(b) "retains the concept of the former rule that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence." Furthermore, the Committee indicates that, even after December 1, 1991, denominating the motion as one for judgment nov is merely a formal error and "Such motion shall be treated as a motion for judgment as a matter of law in accordance with this rule." I conclude that the amendment is, as to the motion presently before the Court, merely one of terminology not affecting the decision of the motion either procedurally or substantively. However, the new terminology will be used below, consistent with the amendment's present effectiveness.

TIMELINESS OF THE MOTION

Plaintiffs contend (Reply of Plaintiffs to Defendants Renewed Motion, Doc. #198) the motion is untimely because under Fed. R. Civ. P. 50(b), a motion for judgment nov must be made within ten days of the entry of judgment and judgment in this action was entered in September, 1983. The judgment to

which Plaintiffs refer (Doc. #74) granted Defendants motion for judgment nov on statute of limitations grounds. That Judgment was appealed by Plaintiffs and reversed by the Sixth Circuit in *Adkins v. Intern. Union of Elec., Radio & Machine Workers,* 769 F. 2d 330 (1985). That prior judgment, having been vacated, is of no further force and effect. Surely Rule 50(b) does not mean that once a party has moved for judgment nov in a case with respect to a particular judgment, it cannot again make such a motion as to a later judgment in the case, yet this is the reading for which Plaintiffs contend. Nothing in the text of Rule 50(b) suggests such a reading and it should be rejected by the Court.

Since no final judgment has yet been entered in this case, there appears to be some dispute between the parties as to whether the motion is premature. Defendants rely on *Collins v. State of Illinois,* 830 F. 2d 692 (7th Cir. 1987), in which a motion for judgment nov filed after verdict but before judgment was held timely, even though it was more than ten days after the verdict. Plaintiffs attempt to distinguish *Collins* (Doc. #198, p. 3, n.1). The *Collins* case is, however, completely inapposite. The issue in that case was those defendants' reliance on the old version of Rule 50(b) which required the motion for judgment nov to be made within ten days of the verdict. The time portion of the rule was amended in 1963 to its present form to make it consistent with the time limits for a motion for new trial. Advisory Committee Note, 31 F.R.D. at 645. The text of the rule as now written requires the motion to be filed not later than ten days after judgment. Defendants' motion is timely since no judgment, other than one which has been vacated, has been entered in the case.

LAW OF THE CASE DOCTRINE

The propriety of this Court's denial of Defendants' motions

for directed verdict was previously appealed to the Sixth Circuit which affirmed the denial of a directed verdict. *Adkins*, 769 F. 2d at 336-37. The complete opinion of the Court of Appeals on this assigned error is as follows:

> General Motors has cross-appealed in the Adkins and Model Makers cases, arguing that in neither case have plaintiffs shown a cause of action. A hybrid section 301/unfair representation claim requires the plaintiff to show that the employer breached the collective bargaining agreement and that the union acted in such a discriminatory, dishonest, arbitrary or perfunctory fashion as to breach its duty of fair representation. *DelCostello* [*v. International Brotherhood of Teamsters*], 462 U.S. [151] at 163-164,103 S. Ct. at 2289-90. . . . In the Model Makers case, plaintiffs properly produced evidence that General Motors agreed to immediately reclassify the plaintiffs and failed to do so and that the union represented the model makers in an arbitrary or perfunctory manner, we reject defendants' contention that arbitrariness is an inappropriate standard to apply to union conduct when negotiating contract provisions. The evidence of a claim was far from controverted, but it was sufficient to sustain a jury verdict.

Id.

Ordinarily when a court of appeals decides a question, that

decision becomes the law of the case upon remand and further appeal and precludes reconsideration of identical issues. *Petition of United States Steel Corporation*, 479 F. 2d 489, 493-94 (6th Cir. 1973), *Ex parte Sibbald v. United States*, 12 Pet. (37 U.S.) 489, 9 L. Ed. 1167 (1838). However, the law of the case doctrine is not applicable if "a controlling authority" subsequently takes a "contrary view of the law." *Petition of United States Steel Corporation*, 479 F. 2d at 494, citing *White v. Murtha*, 377 F. 2d 428, 431-32 (5th Cir. 1968).

The United States Supreme Court being "a controlling authority" with respect to the Sixth Circuit, the question is whether the Supreme Court's opinion in *Air Lines Pilots Ass'n.* represents a contrary view of the law to that enunciated in *Adkins*. In *Air Line Pilots Ass'n.*, Justice Stevens wrote for a unanimous Court:

> We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a "wide range of reasonableness," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S. Ct. 681, 686, 97 L. Ed. 1048 (1953), as to be irrational.

111 S. Ct. at 1130.

In *Air Line Pilots Ass'n.*, the district court granted a motion for summary judgment in favor of the union on the pilots' claim, among others, that "ALPA negotiated an agreement which arbitrarily discriminated against striking pilots." Because the standards for granting summary judgment and a directed verdict

are the same,[1] in effect the district court held that the pilots had not produced sufficient evidence for a jury to decide by a preponderance of the evidence that the union had acted arbitrarily.

The Fifth Circuit reversed. 886 F. 2d 1438 (1989). Interpreting the arbitrariness component of unfair representation claims laid down in *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967), the Fifth Circuit stated:

> We think a decision to be non-arbitrary must be (1) based upon relevant, permissible union factors which excludes the possibility of its being based upon motivations such as personal animosity or political favoritism; (2) *a rational result of the consideration of these factors;* and (3) inclusive of a fair and impartial consideration of the interests of all employees.

886 F. 2d, at 1444, quoting *Tedford v. Peabody Coal Co.*, 533 F. 2d 952, 957 (5th Cir. 1976) (emphasis added by the Court of Appeals). Thus the Fifth Circuit was specifically concentrating on the necessary rationality component of non-arbitrary union decisions.

On appeal to the Supreme Court, the ALPA union attempted in vain to have that Court repudiate the arbitrariness element altogether, which the Court refused to do. The Court did, however, reject the Fifth Circuit's further refinement of the arbitrariness standard as quoted above

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1. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247-48 (1986).

We are persuaded, however, that the Court of Appeals' further refinement of the arbitrariness component of the [*Vaca v. Sipes*] standard authorizes more judicial review of the substance of negotiated agreements than is consistent with national labor policy.

As we acknowledged above, Congress did not intend judicial review of a union's performance to permit the court to substitute its own review of the proper bargain for that reached by the union. Rather, Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature. Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. *Cf. Day-Brite Lighting. Inc.. v. Missouri,* 342 U.S. 421, 423, 72 S. Ct. 405, 407, 96 L. Ed. 469 (1952) (court does "not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare"); *United States v. Carolene Products,* 304 U.S., at 154, 58 S. Ct., at 784 (where "question is at least debatable," "decision was for Congress"). For that reason, the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as

> so far outside a "wide range of reasonableness," *Ford Motor Co. v. Huffman*, 345 U.S., at 338, 73 S. Ct., at 686, that it is wholly "irrational" or "arbitrary."

Air Line Pilots Ass'n., 111 S. Ct., at 1135-36.

The Supreme Court does not cite appellate cases from circuits other than the Fifth with which its decision in *Air Line Pilots Ass'n.* may be in conflict. Neither party has cited this Court to Sixth Circuit precedent defining the arbitrariness component of the *Vaca v. Sipes* standard. It appears that the controlling case is *Ruzicka v. General Motors Co.*, 523 F. 2d 306 (6th Cir. 1975), in which the court adopted a standard enunciated by the Fourth Circuit:

> A union must conform its behavior to each of these three separate standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct.

523 F. 2d, at 309-10, quoting *Griffin v. International Union of United Automobile Workers*, 469 F. 2d 181, 183 (4th Cir. 1974). In *Ackley v. Local Union 337*, 910 F. 2d 1295 (6th Cir. 1990), the court upheld a jury verdict for plaintiffs in a meshing of seniority situation upon a finding of some hostility by union leadership over the dissent of Judge Nelson who would have upheld the union decision. However, the Sixth Circuit apparently regards its

prior interpretation of *Vaca* as impacted by *Air Line Pilots Ass'n.*, because upon reconsideration of its first *Ackley* decision in light of the Supreme Court's decision, it reversed and ordered the entry of judgment notwithstanding the verdict on the basis of Judge Nelson's dissent. *Ackley v. Local Union 337*, ___ F. 2d ___. 1991 U.S. App. LEXIS 25780 (10/31/91). I conclude that *Air Line Pilots Ass'n.* represents a view of the law contrary to the view taken by the Sixth Circuit on the prior appeal in this case. Therefore, the doctrine of law of the case does not bar reconsideration of whether there was sufficient evidence to permit the jury to find the Union had acted arbitrarily.

THE MERITS OF THE MOTION

When the standard of *Air Line Pilots Ass'n.* is applied to the evidence in this case, I conclude the motion for judgment as a matter of law should be granted.

As *Air Line Pilots Ass'n.* directs, we must view the union's decision "in light of the factual and legal landscape at the time of the union's actions." 111 S. Ct., at 1130. The facts as I find them are set forth in the original Report and Recommendations (Doc. #171) and are summarized as relevant here.

In January, 1979, all Plaintiffs were employed at the Frigidaire Division of General Motors as model makers, a function in the product engineering department of Frigidaire which was responsible for design of new appliance products. All Plaintiffs were also members of Defendant Local 801, which represented all of the unionized GM employees at Frigidaire.

In January, 1979, GM decided to sell the Frigidaire business to White Consolidated Industries and convert the two Frigidaire

plants in Moraine, Ohio, to functions for its Chevrolet Division, specifically truck assembly and building of engines. The Chevrolet Division already had a product engineering department in Michigan and did not plan to replicate that function in Dayton. Plaintiffs were informed of that decision before the Frigidaire plants ceased production.

Local 801 negotiated on behalf of all its members to obtain for them employment in the new Chevrolet plants with retained Frigidaire seniority and potential for employment at other Dayton-area GM plants. It was successful: GM agreed that 801 members would have recall rights to other Dayton plants and to the remodeled Chevrolet plants. Furthermore, the twenty-eight Frigidaire skilled trades classifications would be melded with the fourteen Chevrolet skilled trades classifications[2] and skilled tradespeople would retain, in addition to plant seniority, their skilled trades seniority.

Since there would not be any model making function in the Chevrolet plants, these arrangements were not applied to the model makers. Instead, GM and Local 801 agreed the individual model makers' skills would be examined to determine if they could be reclassified to one of the Chevrolet skilled trades. (I.e., other Frigidaire skilled trades were reclassified on a group basis; model makers were reclassified on a one-by-one basis.) They would then be eligible for recall to the Chevrolet plants after the persons already in those skilled trades and would get a new date-of-entry skilled trades seniority date when they were recalled.

All model makers were laid off from Frigidaire on February 23, 1979, and they were not reclassified until the model maker

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2. The only classification both Divisions had in common was "tinsmith" (Doc. #171, p. 24).

reclassification agreement was signed in May, 1980. The jury found that the model makers should have been immediately reclassified to the Chevrolet skilled trades classifications and should have retained their original Frigidaire skilled trades seniority dates, which would have enabled them to be recalled ahead of some of the Frigidaire skilled tradespeople in other skills who were reclassified as a group.[3] Local 801 was found liable for unfair representation for permitting these results. In essence, the jury gave the model makers the deal they believed the union should have negotiated for them instead of the deal the union actually negotiated.[4]

This Court, including the trial jury, cannot be said to have deferred to the union's decision in this case in the same manner as courts are required to defer to legislatures, but that is what *Air Line Pilots Ass'n.* commands. The distinction made by Local 801 between the model makers and the other skilled trades was certainly not "wholly irrational." All of the other skilled tradespeople were going to be continuing to perform at Chevrolet the same job functions as they performed at Frigidaire, albeit under a different classification name. The model making function, on the other hand, was completely abolished. The model makers were entering new job functions, albeit functions for which they were individually prepared by past employment, often with other employers.

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3. Plaintiffs contend the jury found other breaches of contract by General Motors; for the reasons set forth at length in the original Report and Recommendations, I have concluded only these two breaches of contract were submitted to the jury. (Doc. #171, pp 7-23).

4. Since a § 301 plaintiff is entitled to trial by jury, the judicial review of union-negotiated agreements referred to by the Supreme Court in *Air Line Pilots Ass'n.* is actually review by a jury, subject to the usual rules for court governance of jury decision making.

Appendix C

Fairness arguments can obviously be made both ways. It would not have been unfair to the other skilled trades to treat all Frigidaire skilled tradespeople as a class and integrate them into the Chevrolet plants in accordance with their original skilled trades dates at Frigidaire, the result the Plaintiffs wanted and obtained from the jury. But it also would not have been unfair to regard the model makers as starting over at new skilled trades, the result GM and Local 801 negotiated. Since the agreement negotiated by the union is not "wholly irrational," it cannot be held arbitrary and thereby in isolation of § 301. In the words of *Carolene Products*, quoted in *Air Line Pilots Ass'n.*, the seniority question is "debatable" and the court should therefore defer to the union, as it would to a legislature in parallel circumstances.

Reaching this result does not require an inappropriate substitution of the Court's judgment for that of the jury. In *Air Line Pilots Ass'n.*, the Supreme Court itself weighed the rationality of the various outcomes and itself determined that the result achieved by the union there was not wholly irrational; it unanimously found that the district court's summary judgment for the union should not have been disturbed. Likewise in *Ackley v. Local Union 337*, the Sixth Circuit, applying *Air Line Pilots Ass'n.*, remanded with instructions to enter judgment notwithstanding the verdict for the defendant union.

The result achieved in this case by Local 801 for the model makers certainly is better for the Plaintiffs than the result achieved for the unsuccessful plaintiffs in *Air Line Pilots Ass'n.*: the Supreme Court there assumed the plaintiffs would have been better off if their union had completely capitulated to the employer in a strike situation and just gone back to work. If a negotiated result worse than complete surrender can be found sufficiently rational to permit a unanimous Supreme Court to

uphold summary judgment for the union, surely the much better results achieved by Local 801 for the model makers here is sufficiently rational to compel the same result.[5]

CONCLUSION

On the basis of *Air Line Pilots Ass'n. v. O'Neill, supra,* the Court should GRANT Defendants' Renewed Motion for Judgment Notwithstanding the Verdict and enter judgment as a matter of law in favor of the Defendants and against the Plaintiffs, discussing this action with prejudice.

December 28, 1991.

s/ Michael R. Merz
Michael R. Merz
UNITED STATES MAGISTRATE JUDGE

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5. As Defendants point out in their Memorandum (Doc. #196), the pattern makers, the other skilled tradespeople in the Frigidaire Product Engineering Department, were unrepresented by the union and just disappeared from the new Chevrolet plants. The Court should also not ignore the other benefits which the union negotiated for the model makers or knew they would have: recall rights as model makers to other GM Divisions in the Dayton area and supplemental unemployment benefits which, with state unemployment compensation, would give them 95% of their employed pay for a substantial period of time. The existence of SUB pay resulted in a very substantial decrease in back pay damages in this case, even applying the jury verdict.

APPENDIX D — DECISION AND ENTRY OVERRULING RENEWED MOTION FOR NEW TRIAL AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND/OR FOR NEW TRIAL OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO FILED JUNE 5, 1989

IN THE UNITED STATES DISTRICT COURT
FOR TE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-3-81-343

ASSOCIATION OF FRIGIDAIRE MODEL MAKERS, et al.,

Plaintiffs,

GENERAL MOTORS CORPORATION, et al.,

Defendants.

DECISION AND ENTRY OVERRULING RENEWED MOTION OF DEFENDANT GENERAL MOTORS CORPORATION FOR NEW TRIAL (DOC. #98) AND MOTION OF DEFENDANT UNIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND/OR FOR NEW TRIAL (DOC. #101)

Based upon a consideration of all pleadings and memoranda filed in the captioned cause, including, *inter alia,* memoranda filed both in support of and in opposition to the Renewed Motion of Defendant General Motors Corporation for New Trial (Doc. #98) and Motion of Defendant Unions for Judgment Notwithstanding the Verdict and/or for New Trial (Doc. #101), a well as upon the arguments of counsel adduced at an oral hearing upon said motions, it is the opinion of this Court that the aforesaid

motions are not well taken and same are, therefore, overruled, each in their entirety.

s/ Walter H. Rice
WALTER H. RICE
UNITED STATES DISTRICT JUDGE

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Honorable Michael R. Merz, United States Magistrate

APPENDIX E — ADDENDUM TO THE DECISION AND ENTRY AFFIRMING THE VERDICT OF THE JURY (FILED JULY 1, 1988) OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO FILED JULY 15, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-3-81-343

ASSOCIATION OF FRIGIDAIRE MODEL MAKERS, et al.,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION, et al.,

Defendants.

ADDENDUM TO THE DECISION AND ENTRY AFFIRMING THE VERDICT OF THE JURY FILED JULY 1, 1988

The Court finds support for its interpretation of what constitutes a "valid, timely, nonfrivolous attempt" in the recent case of *Andrews v. Orr,* slip op. (6th Cir. June 30, 1988) (1988 WL 66332). In *Andrews,* the plaintiffs were *reasonably ignorant* of the fact that a particular motion for class certification upon which they had been relying had been extinguished, and therefore were unaware that the statute of limitations had begun to run on their claim. *Andrews v. Orr,* slip op. at 10-14. The Sixth Circuit concluded that under the doctrine of equitable tolling the plaintiffs should not be penalized for their reasonable ignorance.

Appendix E

Id. In the case at bar, Plaintiffs were *reasonably ignorant* of the fact that their attempt to grieve was useless and therefore were unaware that the statute of limitations had begun to run on their claim. The Court concludes that it would be grossly unfair to penalize Plaintiffs for their reasonable ignorance.

s/ Walter H. Rice
WALTER H. RICE
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Honorable Michael R. Merz, United States Magistrate

APPENDIX F — DECISION AND ENTRY AFFIRMING THE VERDICT OF THE JURY (WITH) ORDER OF REFERENCE TO UNITED STATES MAGISTRATE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO FILED JULY 1, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-3-81-343

ASSOCIATION OF FRIGIDAIRE MODEL MAKERS, et al.,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION, et al.,

Defendants.

DECISION AND ENTRY AFFIRMING THE VERDICT OF THE JURY; JUDGMENT ENTERED IN FAVOR OF THE PLAINTIFFS AND AGAINST THE DEFENDANTS; ORDER OF REFERENCE TO UNITED STATES MAGISTRATE TO ASSESS AMOUNT OF DAMAGES AND TO AFFIX THE SENIORITY RIGHTS AND OBLIGATIONS TO THE PARTIES, PURSUANT TO THE JURY VERDICT

This case is before the Court on the Order of Remand of the United States Court of Appeals for the Sixth Circuit (Doc. #87). For the reasons set forth below, the Court concludes that the verdict of the jury must be affirmed and that judgment must ultimately be entered in favor of the Plaintiffs and against the Defendants.

Appendix F

This action was brought on June 24, 1981, pursuant to Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. Plaintiffs alleged that the Defendants breached labor contracts and their duty of fair representation by, *inter alia*, failing to classify Plaintiffs into new job categories and by failing to preserve their seniority. On June 23, 1982, following a civil trial, a jury found for Plaintiffs on the issue of liability. Subsequently, the Defendants filed Motions for Judgment Notwithstanding the Verdict on the grounds that this lawsuit was filed beyond the proper statute of limitations period. In a Decision and Entry filed September 21, 1983, this Court sustained Defendants' Motions for Judgment Notwithstanding the Verdict, concluding that Plaintiffs' action is barred by the statute of limitations (Doc. #74). In so doing, the Court noted that while the question of the applicable statute of limitations in a hybrid 301 case was "open and unsettled" at the time of trial, the United States Supreme Court had since decided the case of *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983) in which it held that the proper statute of limitations in a hybrid 301 action is the six-month statute found in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160b (Doc. #74, at 2). Plaintiffs thereafter appealed said Decision and Entry to the United States Court of Appeals for the Sixth Circuit. In a Decision filed July 22, 1985, the Sixth Circuit remanded the Plaintiffs' case to this Court "for a determination whether plaintiffs' January, 1981 attempt to file grievances prevented accrual of their claim until that time." *Adkins v. International Union of Electrical, Radio & Machine Workers*, 769 F.2d 330, 337 (6th Cir. 1985).

DISCUSSION

In its Decision in this case, the Sixth Circuit concluded that "where . . . [a] union's alleged breach of duty is in a non-

grievance context, as here, the employees' good-faith attempt to exhaust their contractual remedies will prevent the accrual of their action." *Id.* at 336. The Sixth Circuit went on to state that "there was no accrual of the claim for the purposes of the limitation period so long as plaintiffs were making a valid, timely, and non-frivolous attempt to pursue their contractual remedies in reasonable good faith." *Id.* The sole question facing this Court is whether the Plaintiffs' January, 1981 attempt to file grievances constituted such an attempt.[1]

Plaintiffs contend that in early January, 1981, certain letters, which were admitted into evidence as Plaintiffs' Exhibits 20 and 21, were sent by certified mail to Defendant Local 801 and Defendant General Motors respectively (Doc. #94, at 1-2). After reviewing all of the evidence in the record, this Court concludes that said letters were indeed mailed by the Plaintiffs. The Court notes that both Plaintiffs' Exhibit 20 and Plaintiffs' Exhibit 21 are styled as grievances. Exhibit 20 specifically states: "This *grievance* is filed on behalf of all former Frigidaire model makers, apprentices, and upgraders at the time of Frigidaire's closing." Exhibit 21 includes virtually identical language. (Plaintiffs' Exh. 20; Plaintiffs' Exh. 21) (emphasis added). Based upon the foregoing, this Court concludes that Plaintiffs did *attempt* to file a grievance in January, 1981. The question which remains, however, is whether said attempt can be characterized as "valid, timely, and non-frivolous". *Adkins*, 769 F.2d at 336.

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1. All parties fully briefed the issue addressed within the body of this decision, to wit: whether Plaintiffs' January, 1981, attempts to file grievances prevented accrual of the claim until that time and the further question of whether an evidentiary hearing was needed to more fully develop the facts germane to that issue. (Doc. #90, #91, #92). Each party eschewed the need for such a hearing. (Doc. #90, #91, #92).

Appendix F

Before determining whether the Plaintiffs' attempt was indeed valid, the Court must first examine exactly what the Sixth Circuit meant when it required a *valid* attempt on the part of Plaintiffs. The Court first notes that, contrary to the assertions of Defendant General Motors, the Sixth Circuit did not require a valid *grievance*, but instead required a valid *attempt* to file a grievance. *See Adkins*, 769 F.2d at 336. Thus, the issue of whether Defendant Local 801 and/or Defendant General Motors actually received Plaintiffs' letters is irrelevant. The Sixth Circuit did not require a *successful* attempt, but instead merely required a *valid* attempt.

Defendants appear to argue that in order to be a "valid" attempt, an attempt must be objectively valid. In other words, Defendants would have this Court consider validity in terms of the potential for success. Thus, if the proper grievance procedure is not followed, or if in fact, no applicable grievance procedure exists, under the Defendants' theory of objective validity, there could be no "valid" attempt because a grievance filed under those conditions could not possibly succeed. This Court concludes, however, that the Sixth Circuit does *not* require objective validity.

Both the Sixth Circuit and the jury determined that any attempt by the Plaintiffs in this case to use the grievance procedure was futile. *Id.* at 336. Despite the fact that any attempt to grieve would be futile, the Sixth Circuit did not conclude that any attempt by Plaintiffs to grieve was automatically invalid. Once the Sixth Circuit determined that a futile attempt could be a valid attempt, objective validity became a non-issue. Even if an attempt to grieve does not have a chance of succeeding, such an attempt can still be a valid one.

Appendix F

While it is clear that the Sixth Circuit does not require objective validity, this Court cannot conclude that the Sixth Circuit would merely require *purely* subjective validity. One of the basic ideas behind the statute of limitations is to prevent a person who has been injured in some way from resting on his/her oars. A person who is attempting to exhaust his/her contractual remedies is not resting upon his/her oars. In essence, the Sixth Circuit has concluded that it would be unfair to penalize someone who was making a reasonable, good-faith effort to exhaust administrative remedies before seeking judicial remedies. A valid attempt to file a grievance is one which is made in reasonable, good faith. In other words, the test for validity is whether or not a reasonable person, under the circumstances, would have believed that he/she was filing a valid grievance. This Court bases its conclusion that a reasonable person test (as opposed to a purely subjective test) is required upon the fact that the Sixth Circuit itself specifically required that Plaintiffs act "in *reasonable* good faith. *Id.* (emphasis added).[2]

The Court concludes that the Plaintiffs in this case did act in reasonable good faith, and thus, did make a valid attempt to file a

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2. In addition, the Court finds the situation in the case at bar to be analagous to a situation in which the so-called "discovery rule" comes into play. Under the discovery rule, the time of accrual is *not* forever delayed. A plaintiff's ignorance as to his/her injury will not always delay the accrual of his/her claim. Instead, his/her claim accrues when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the violation." *Adkins*, 769 F.2d at 335. There simply comes a point when there is no excuse for failing to realize that legal action is necessary. Similarly, in cases such as the case at bar, in which administrative action can delay accrual, the ignorance of a plaintiff will not always delay the accrual of his/her claim. There are times when there is no excuse for failing to realize that the action which is being taken is simply not sufficient to constitute the filing of a grievance. Thus, a *reasonable* person test is required.

grievance. It is true that a number of the Plaintiffs were familiar with the grievance procedure established by the collective bargaining agreement. It is also true that Plaintiff Shaw attempted to file an individual grievance regarding the issue of classification and was told that he could not do so. However, the Court notes that Plaintiffs were faced with a unique situation. A worker might ordinarily file a grievance over a denial of overtime, or a change in shift, or some other problem which is unique to that particular worker. In such situations, filing a grievance with the foreman seems logical, for there may well be some action which the foreman could take to rectify the situation. In the case at bar, Plaintiffs were faced with a situation in which an entire class of workers felt they had been wronged. It was not unreasonable for the Plaintiff to conclude that the usual grievance procedure simply was not applicable to such a situation. This was obviously not the type of problem that a foreman could rectify. Accordingly, Plaintiffs sought relief from a higher authority. With no help whatsoever from their employer or from their union, Plaintiffs were attempting to protect their rights. Plaintiffs were factory workers, not attorneys, and given the intricacies of their collective bargaining agreement, their failure to understand that they were not filing a valid grievance is completely understandable.

Based upon the foregoing, the Court concludes that Plaintiffs did, in fact, make "a valid, timely,[3] and

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3. The Court concludes that the issue of timeliness is simply one of the elements to be considered in determining whether the Plaintiffs were making a *reasonable* good-faith effort to exhaust their administrative remedies. Once again, the Court notes that the situation with which the Plaintiffs were faced was unique. A reasonable person could very well believe that the usual grievance procedures were inapplicable, and thus, that the usual time limitations were nonbinding. The Court

(Cont'd)

nonfrivolous[4] attempt to pursue their contractual remedies in reasonable good faith." *Id.* Accordingly, the Court concludes that Plaintiffs' January, 1981 attempt to file grievances did prevent the accrual of their claim until that time.[5] Thus, the jury verdict must be and hereby is affirmed.

The jury having concluded the liability issues in the captioned cause in favor of the Plaintiffs, the Court hereby refers that captioned cause to the United States Magistrate, Michael R. Merz, as a Special Master, pursuant to Fed. R. Civ. P. 53(b) subject to the powers enumerated in Fed. R. Civ. P. 53(c), with

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(Cont'd)
does not believe that in this case the Plaintiffs knew or should have known that they were required to take any administrative action prior to January of 1981. Accordingly, the Court concludes that Plaintiffs' attempt to pursue their contractual remedy was timely.

4. The Sixth Circuit has held that "an appeal is frivolous if it is obviously without merit and is prosecuted for delay, harassment, or other improper purposes." *Dallo v. Immigration and Naturalization Service*, 765 F.2d 581, 589 (6th Cir. 1985). In the case at bar, there is absolutely no evidence to the effect that Plaintiff's grievance was filed for any improper purpose. Thus, the Court concludes that Plaintiffs' attempt to grieve was not frivolous.

5. Defendant Unions assert that even if Plaintiffs' action accrued on January 2, 1981, Plaintiffs have not met their duty to produce evidence that the action accrued within six months of the date the lawsuit was brought on June 24, 1981 (Doc. #90, at 9). Defendants appear to argue that Plaintiffs are required to provide evidence that they became aware of some additional Union misconduct after December 24, 1980. This argument is without merit. Regardless of whether or not Plaintiffs became aware of additional misconduct after December 24, 1981, Plaintiffs possess a valid claim for their cause of action for misconduct occurring prior to that date, which did not accrue until some time after the Plaintiffs' January, 1981 attempt to grieve.

specific directions that the Magistrate assess the amount of damages and affix the seniority rights and obligations of the parties, pursuant to the jury verdict. Following the completion of whatever procedures are deemed necessary by the Magistrate to carry out the purpose of this referral, he is to provide this Court with a Report and Recommendations to which the aggrieved party or parties may file timely objections.

s/ Walter H. Rice
WALTER H. RICE
UNITED STATES DISTRICT JUDGE

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Honorable Michael R. Merz, United States Magistrate

APPENDIX G — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JULY 18, 1988

Nos. 83-3392, 83-3416, 83-3754,
83-3793, 83-3820

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN J. ADKINS, et al., (83-3392, 83-3416),

Plaintiffs-Appellants,
Cross-Appellees,

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO-CLC; LOCAL 801, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO-CLC,

Defendants-Appellees,

GENERAL MOTORS CORPORATION,

Defendant-Appellee,
Cross-Appellant.

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ASSOCIATION OF FRIGIDAIRE MODEL MAKERS, et al., (83-3754, 83-3793),

Plaintiffs-Appellants, Cross-Appellees,

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO-CLC; LOCAL 801, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO-CLC,

Defendants-Appellees,

GENERAL MOTORS CORPORATION,

Defendant-Appellee, Cross-Appellant.

FORMER FRIGIDAIRE EMPLOYEES ASSOCIATION, et al., (83-3820),

Plaintiffs-Appellants,

v.

LOCAL 801, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO-CLC; et al.,

Defendants-Appellees.

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ON APPEAL from the United States District Court for the Southern District of Ohio

Decided and Filed July 18, 1985

Before: ENGEL and MARTIN, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

BOYCE F. MARTIN, JR., Circuit Judge. These cases are all hybrid section 301/unfair representation claims stemming from the layoffs of various groups of employees by General Motors Corporation. Because all the cases evolve out of the same set of facts and present related issues concerning the application of the six-month statute of limitations adopted in *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983), they were consolidated for decision. We affirm in the Adkins and Frigidaire Employes cases and remand in the Model Makers case.

The General Motors facilities involved in this litigation were originally operated by its then Frigidaire Division in the cities of Moraine and Dayton, Ohio. At the time, Frigidaire manufactured household appliances and automobile air conditioners. In these plants all hourly rated employees were represented by Local 801 of the International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC, and all were paid wages keyed to the automobile industry, rather than the lower wages of the appliance industry.

In 1971, General Motors was able to negotiate a lower wage scale for its appliance workers in the Frigidaire Division. In exchange, these workers were allowed to "flow," or transfer, to the higher-paying automotive jobs as openings occurred, and to flow back to the appliance jobs to avoid layoffs when business

declined, bumping less senior appliance workers if necessary. In 1974, the automobile air conditioner facilities were split off from Frigidaire into the Delco Air Conditioning Division, now Harrison Radiator Division, but the flow arrangement with the Frigidaire appliance workers was retained. In 1976, the parties memorialized the flow arrangement in a Bridge Agreement, which was due to expire in September 1979. This agreement provided that Frigidaire workers would retain their flow rights until all employees were given an opportunity to transfer to Delco and 900 new Delco workers were hired. Through 1979, some 2000 Frigidaire employees had transferred to Delco and some 3500 Frigidaire employees had retained but not exercised their flow privileges under the Bridge Agreement. During this period 2500 new Frigidaire employees had been hired after January 1, 1977, and held no rights under the agreement.

In 1979, General Motors decided for economic reasons to sell the Frigidaire Division to White Consolidated Industries, retaining just the physical plants. The current employees also were not part of the sale. The plants were to be converted to the production of diesel engines and the assembly of light trucks under the company's Chevrolet Division. The conversion process was expected to take at least two years, during which time all their Frigidaire employees in these plants would be laid off, except for a few skilled craftsmen involved in the conversion.

The Unions and General Motors negotiated the effects of the layoff in a series of meetings held between January 31 and February 20, 1979. General Motors obtained its major objectives — termination of the Bridge Agreement and the right to lay off by product line rather than by seniority. The International Union also won its major objectives: laid-off Frigidaire workers would be hired in the new Chevrolet plants with unbroken seniority, and the

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International Union and Local 801 would continue to be the bargaining representatives of these new Chevrolet Division employees. Apparently General Motors had planned on this in any case. But General Motors also agreed that all laid-off Frigidaire employees would have recall rights to Delco, which was then running at full employment, with overtime, and informally agreed to make efforts to get the laid-off employees work elsewhere. Because it was apparent that no employees in the category of model makers would be needed in the new plants, the parties informally agreed to establish a joint committee to review the model makers' records for reclassification, if qualified, to another trade classification.

This agreement was ratified on February 23, 1979, and layoffs began shortly thereafter. The model makers were among the first to be laid off. By the spring and summer of 1979, the Frigidaire facilities were completely closed and were being converted for Chevrolet. During July and August of 1979, the Delco contract, due to expire in September 1979, was renegotiated and the Bridge Agreement was eliminated. Other problems soon arose and late in 1979, due to an economic downturn, Delco laid off employees in substantial numbers, including many of the former Frigidaire workers now working at Delco under the transfer arrangement. In January 1981, Chevrolet began to recall the former Frigidaire employees to the converted plants. At this time there were no Delco employees recalled.

On June 24, 1981, the Association of Frigidaire Model Makers and 49 of Frigidaire's former model makers filed a hybrid section 301/unfair representation claim against General Motors, the International Union, and Local 801, for the alleged failure to promptly reclassify the model makers to other trades. Most or all

of the model makers had regained employment with General Motors, but they sought lost wages and seniority rights resulting from the breach. On January 18, 1982, John J. Adkins and 488 other laid-off Delco employees, all former Frigidaire employees who had exercised their flow options, brought a section 301/ unfair representation claim against the same defendants. They essentially alleged that the unions violated employees' right of fair representation by trading their rights under the Bridge agreement for the unions' continued representation of the new Chevrolet facilities. The suit also included a claim that the union denied the employees' right of informed and meaningful participation in deliberation and voting under section 101(a) (1) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(1). The plaintiffs also included 327 of the employees' spouses, suing for loss of consortium.

In the spring of 1982, General Motors and the defendant unions began negotiating collective bargaining agreements to replace the 1979 agreements due to expire in September 1982. At this time, substantial numbers of the former Frigidaire workers were still on layoff, and their recall rights were to expire with this agreement. General Motors offered to the unions the opportunity to extend these recall rights for an additional two years. There were also substantial numbers of Delco employees still on layoff, however, and because General Motors in hiring gave preference to laid-off General Motors employees, allowing the Frigidaire, employees' recall rights to expire would give greater employment opportunities to the more senior laid-off Delco employees. Trapped in this dilemma, the unions refused the offer to extend the recall rights.

On October 19, 1982, laid-off Frigidaire employee Lillie Henry filed an unfair labor practice charge with the National

Labor Relations Board The NLRB dismissed the charge on November 10, 1982. The Former Frigidaire Employees Association and 207 former Frigidaire employees, including Lillie Henry, then filed a section 301/unfair representation action on April 1, 1983, against General Motors, the International Union, Local 801, and the I.U.E./G.M. Conference Board, an organization formed by the International Union to oversee labor relations with General Motors. The plaintiffs' central claim in both the Frigidaire Employees and the Adkins cases was, of course, that the unions discriminated against them in favor of the other group of employees.

The district court dismissed the Adkins case as untimely filed on April 15, 1983. *Adkins v. General Motors Corp.*, 573 F. Supp. 1188 (S.D. Ohio 1983). The Model Makers case was tried before a jury beginning June 14, 1982, when the district court permitted the defendants for the first time to raise the defense that the action was barred by the statute of limitations. After a jury verdict finding for the plaintiffs on liability, the district court on September 21, 1983, issued a judgment notwithstanding the verdict finding the action time-barred. *Association of Frigidaire Model Makers v. General Motors Corp.*, 573 F. Supp. 236 (S.D. Ohio 1983). In the Frigidaire Employees case, the district court granted defendants' motion for summary judgment on October 7, 1983, again finding the action time-barred. *Former Frigidaire Employees Association v. International Union of Electrical Workers, Local 801*, 573 F. Supp. 59 (S.D. Ohio 1983).

On June 8, 1983, the Supreme Court decided *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), holding that hybrid section 301/unfair representation claims are subject to the six-month statute of limitations applicable to unfair labor practice claims under section 10(b) of the National Labor

Relations Act, 29 U.S.C. § 160(b). The decision in the Supreme Court, however, was foreshadowed by an earlier case in this Circuit also brought against General Motors. *Badon v. General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982). Later this court ruled en banc in *Smith v. General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984) (en banc), that *DelCostello* would be applied in all pending hybrid section 301/unfair representation cases.

An initial issue in the Model Makers case is whether the district court erred in permitting the defendants to amend their pleadings so late in the proceedings. Leave to assert an affirmative personal defense should be freely granted when justice so requires, Fed. R. Civ. P. 15(a), but a defendant is responsible for any prejudice caused by its untimely assertion of the defense. *See Lawson v. Truck Drivers, Local Union 100*, 698 F.2d 250, 255-56 (6th Cir.), *cert. denied*, 104 S. Ct. 69 (1983); *Estes v. Kentucky Utilities Co.*, 636 F.2d 1131 (6th Cir. 1980); *Hayden v. Ford Motor Co.*, 497 F.2d 1292 (6th Cir. 1974). Here, plaintiffs were not prejudiced in their prosecution of their claim, but they were prejudiced to the extent that they litigated the case when a timely assertion of the defense would have made these costs unnecessary. Their remedy was to recover their costs of litigation, and that is what the district court ordered.

Plaintiffs in all three cases argue that *DelCostello* applies only to grievance cases and should not be extended to the present facts. The factors guiding the Supreme Court's choice of the six-month limitations period for unfair labor practices in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), however, were the close similarity of "all breaches of a union's duty of fair representation" to unfair labor practices and the congressional indication of the proper balance between the employee's interest in vindicating his rights and the national

interests in finality in labor law and industrial peace. *DelCostello*, 461 U.S. at 170-71. These considerations compel application of section 10(b) to all unfair representation claims, *United Parcel Service v. Mitchell*, 451 U.S. 56, 68 n.3 (1981) (Stewart, J., concurring), regardless of the nature or presence of the section 301 claim. *Erkins v. United Steelworkers*, 723 F.2d 837, 838-39 (11th Cir.), *cert. denied*, 104 S. Ct. 3417 (1984); *Turco v. Local Lodge 5, International Brotherhood of Boilermakers*, 592 F. Supp. 1293 (E.D.N.Y. 1984); *accord Sisco v. Consolidated Rail Corp.*, 732 F.2d 1188 (3d Cir. 1984); *see also Storey v. Local 327, International Brotherhood of Teamsters*, 759 F.2d 517 (6th Cir. 1985) (holding that cause of action for unfair representation is not dependent on section 301 claim against employer). For the same reasons, the claim against the unions in the Adkins case under the Labor Management Reporting and Disclosure Act is subject to the same six-month limit. *Local Union 1397, United Steelworkers v. United Steelworkers*, 748 F.2d 180 (3d Cir. 1984).

Time of accrual is also an issue in each case. A claim accrues under section 10(b) when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation. *Shapiro v. Cook United*, No. 83-3087, slip op. at 3 (6th Cir. May 17, 1985) (per curiam); *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612, 614 (11th Cir. 1984) (per curiam); *Metz v. Tootsie Roll Industries*, 715 F.2d 299, 304 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 976 (1984). In the Adkins case, the district court found that the cause of action accrued, at the latest, in January 1981, although the action was not brought until January 1982. *Adkins v. General Motors Corp.*, 573 F. Supp. 1188, 1192-93 (S.D. Ohio 1983). Plaintiffs argue that actual or imputed knowledge that the unions' representation was unfair, rather than merely knowledge of its adverse effect on them, is necessary for accrual of the claim. Defendants argue that

the action accrued when plaintiffs knew or should have known of defendants' actions and their effects. We need not resolve this question, as plaintiffs have not met their duty under Fed. R. Civ. P. 56(e) to produce evidence that the action accrued within six-months of the date it was brought. Indeed, under plaintiffs' theory of the case, there is no reason to believe the claim ever accrued, for the record is devoid of any evidence of union wrongdoing that first came to their attention after July 18, 1981, the date six months before this action was brought. The Adkins case, therefore, is barred by the statute of limitations.

The plaintiffs in the Frigidaire Employees and Model Makers cases argue that their claims did not accrue, or alternatively were tolled, until they exhausted their nonjudicial remedies. We need not long concern ourselves with the argument in the Frigidaire Employees case, also presented in the Model Makers case, that the filing of an unfair labor practice charge with the National Labor Relations Board prevented the claim from accruing. An unfair representation claim is wholly independent of any unfair labor practice charge before the NLRB. *Vaca v. Sipes,* 388 U.S. 171 (1967). An NLRB filing, therefore, does not toll or prevent the accrual of an unfair representation claim. *Aarsvold v. Greyhound Lines,* 724 F.2d 72, 73 (8th Cir. 1983) (per curiam), *cert. denied,* 104 S. Ct. 3538 (1984); *Boyd v. Teamsters Local Union 553,* 589 F. Supp. 794 (S.D.N.Y. 1984); *Gentilviso v. New York Public Library,* 589 F. Supp. 587, 591-92 (S.D.N.Y. 1984); *Nicely v. United States Steel Corp.,* 574 F. Supp. 184, 187-88 (W.D. Pa 1983). The holding to the contrary in *Retail Clerks Union Local 648 v. Hub Pharmacy,* 707 F.2d 1030 (9th Cir. 1983), was based on California state law and has no application here. The Frigidaire Employees case, therefore, is also barred by the statute of limitations.

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The Model Makers argue that their claim did not accrue until the unions ignored their purported attempt to file grievances in January 1981. Under section 301 an employee normally is required to attempt to exhaust any grievance or arbitration remedies provided for in the collective bargaining agreement. *E.g., DelCostello,* 462 U.S. at 163. The hybrid section 301/unfair representation claim is an exception to this exhaustion requirement: an injured employee can bring such an action, notwithstanding his failure to exhaust contractual remedies, *Vaca v. Sipes,* 386 U.S. 171, 185-86 (1976), or an unfavorable outcome in the grievance or arbitration proceedings, *DelCostello,* 462 U.S. at 164. The district court held here that, once the employees knew or should have known that a breach had occurred, their action accrued and the limitations period began to run, even if some possibility of nonjudicial enforcement remained. *Associaton of Frigidaire Model Makers v. General Motors Corp.,* 573 F. Supp. 236, 238 (S.D. Ohio 1983) (citing *Santos v. District Council of United Brotherhood of Carpenters,* 619 F.2d 963, 969 (2d Cir. (1980)). This rule would impel the swift filing of hybrid claims at the expense of nonjudicial resolution of those claims. Certainly, the typical hybrid claim is based on the union's failure to properly process a grievance, so nonjudicial enforcement has already failed. But where the union's alleged breach of duty is in a nongrievance contest, as here, the employees' good-faith attempt to exhaust their contractual remedies will prevent the accrual of their actions. *Cf. Clayton v. UAW,* 451 U.S. 679 (1981) (holding that international union procedures must be exhausted before hybrid claim can be brought, with certain specified exceptions). To hold otherwise would undercut the national policy favoring nonjudicial resolution of labor disputes. *See Johnston Boiler Co. v. Local Lodge No. 893, International Brotherhood of Boilermakers,* 753 F.2d 40, 42-43 (6th Cir. 1985); *Bakers Union Factory, #326 v. ITT Continental Baking Co.,* 749 F.2d 350, 353

(6th Cir. 1984). Although, as the jury found, here any attempt to use the grievance procedure in fact was futile, there was no accrual of the claim for the purpose of the limitation period so long as plaintiffs were making a valid, timely, and nonfrivolous attempt to pursue their contractual remedies in reasonable good faith *Cf. Dallo v. Immigration & Naturalization Service*, No. 84-3393, slip op. at 16 (6th Cir. June 20, 1985) (holding that appeal is frivolous if obviously without merit and prosecuted for delay, harassment, or other improper purposes).

Defendants argue that, even if a properly filed grievance prevents the accrual of a claim, the plaintiffs' January 2, 1981, letters were not properly filed grievances. Because of its holding that a grievance cannot prevent the accrual of a claim, the district court did not reach this issue. We will remand the Model Makers case to the district court for a determination whether plaintiffs' January 1981 attempt to file grievances prevented accrual of their claim until that time.

General Motors has cross-appealed in the Adkins and Model Makers cases, arguing that in neither case have plaintiffs shown a cause of action. A hybrid section 301/unfair representation claim requires the plaintiff to show that the employer breached the connective bargaining agreement and that the union acted in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation. *DelCostello*, 462 U.S. at 163-164. In the Adkins case, because the claims were barred by the statute of limitations, we need not consider General Motors' cross-appeal. In the Model Makers case, plaintiffs properly produced evidence that General Motors agreed to immediately reclassify the plaintiffs and failed to do so and that the union represented the model makers in an arbitrary or perfunctory manner; we reject defendants' contention that arbitrariness is an

inappropriate standard to apply to union conduct when negotiating contract provisions. The evidence of a claim was far from uncontroverted, but it was sufficient to sustain a jury verdict.

The judgments in the Adkins and Frigidaire Employees cases are affirmed. The Model Makers case is remanded to the district court for a determination whether plaintiffs' January 1981 attempt to file grievances presented accrual of their claim until that time.

It is so ordered.

APPENDIX H — DECISION AND ENTRY SUSTAINING DEFENDANTS' MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO DATED SEPTEMBER 21, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-3-81-343

ASSOCIATION OF FRIGIDAIRE MODEL MAKERS, et al.

Plaintiffs

vs.

GENERAL MOTORS CORPORATION, et al.

Defendants

DECISION AND ENTRY SUSTAINING DEFENDANTS' MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT; JUDGMENT TO BE ENTERED FOR DEFENDANTS; PLAINTIFFS' ATTORNEY GIVEN OPPORTUNITY TO RECOVER LITIGATION COSTS

Plaintiff filed this lawsuit on June 24, 1981, premised on § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. They alleged that the Defendants breached labor contracts and their duty of fair representation by, *inter alia*, failing to classify Plaintiffs into new job categories and by failing to preserve their seniority. On the first day of trial in the case, the Court permitted Defendants (over Plaintiffs' objection) to raise,

for the first time, the defense that Plaintiffs' suit was barred by the applicable statute of limitations. However, the Court overruled motions to dismiss on that ground. A jury ultimately found for Plaintiffs on the issue of liability, and the matter was referred to the United States Magistrate for a hearing on the issue of damages. Said hearing was stayed pending resolution of the Defendants' motions (Docs. #41, 43) for judgment notwithstanding the verdict, made pursuant to Fed. R. Civ. P. 50, on the grounds, *inter alia*, of the lawsuit having been filed beyond the proper statute of limitations. For the reasons set out below, the Court now sustains those motions and orders the entering of final judgment for the Defendants.

The issue of the applicable statute of limitations in a "hybrid" § 301 case, such as the within action, was open and unsettled as of the time of the trial of this case. *See, Adkins v. General Motors Corp.*, Case No. C-3-82-011 (S.D. Ohio April 15, 1983), *appeal and cross appeal docketed after final judgment entry*, Nos. 83-3392, 83-3416 (6th Cir. June 14, 1983) (discussing conflicting lines of authority). This issue has now been authoritatively and conclusively resolved, as the parties acknowledge, by the Supreme Court's decision in *DelCostello v. International Brotherhood of Teamsters*, 103 S.Ct. 2281, 2285 (1983), which held that the proper statute of limitations in this type of case is the six-month statute found in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). While the parties acknowledge that this is the proper statute of limitations to be followed in this case, they part company on the issues of (1) when the cause of action accrued, and (2) whether the filing of a complaint with the National Labor Relations Board (NLRB) or alleged misrepresentations made by the Defendants tolled the statute of limitations.

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Applying a six-month statute, Plaintiffs' action, to be barred, must have accrued on or before December 24, 1980 (The Complaint having been filed on June 24, 1981). Defendants offer several dates for the accrual of the action, that is, when the Plaintiffs knew or reasonably should have known that a breach of the duty of fair representation had occurred even if some possibility of nonjudicial enforcement remained. *Ackley, supra*, slip op. at 9 (*quoting, Santos v. District Council of New York City*, 619 F.2d 963, 969 (2d Cir. 1980)). Defendants suggest that the action accrued in late 1979 or early 1980 (when Plaintiffs knew, or should have known, that their recall dates were being adjusted), or May 8, 1980 (the date of an agreement signed between General Motors and the union regarding job classifications), or, at the latest, July of 1980 (the evidence at trial indicating that several of the Plaintiffs felt, by that time, that General Motors was recalling workers in a discriminatory manner). Plaintiffs, in contrast, argue that the action accrued after the filing date, since Plaintiffs were, allegedly, unaware of the May 8, 1980, agreement and were the victims of several misrepresentations by Defendants. Based on the evidence in the record, accurately summarized in Defendants' memoranda, the Court finds that any of the above-mentioned accrual dates suggested by Defendants would be plausible. The Court finds it unnecessary to choose one, since all are *before* the December 24, 1980, date referred to above, *after* which this action must have accrued or be barred. Thus, Plaintiffs filed suit in an untimely fashion.

With regard to the tolling issue, the Court agrees with Plaintiffs that a statute of limitations in a § 301 action can be tolled, based on the "particularized circumstances of [each] case." *United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 708 (1966). *See, Echols v. Chrysler Corp.*, 633 F.2d 722 (6th Cir. 1980); *McNutt v. Airco Industrial Gases Division*, 687 F.2d

539, 543 (1st Cir. 1982). However, tolling is *not* appropriate in this case. To the extent that there is evidence in the record that Defendants may have made certain misrepresentations to Plaintiffs (it is significant to note that Plaintiffs did *not* specifically cite any such evidence), the Court agrees with Defendants that this argument is but another way of alleging that the union breached its duty of fair representation. Even assuming that to be true, Plaintiffs' action accrued (as noted above) before December 24, 1980.

In addition, the fact that at least one of the Plaintiffs filed a complaint with the NLRB in December of 1980 does not toll the action. In *DelCostello* the Supreme Court merely remanded for determination of that issue, among others; it was not purporting to decide the issue. 103 S.Ct. at 2294-95. As Defendants argue, any tolling under federal law must be compatible with the congressional purpose behind the federal statute governing liability. *See, Chardon v. Fumero Soto*, 103 S.Ct. 2611, 2616-17 (1983); *Pesola v. Inland Tool & Mfg., Inc.*, 423 F. Supp. 30, 34 (E.D. Mich. 1976). It is well settled that a § 301 action is independent of any NLRB proceeding. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Hudson v. Teamsters Local Union No. 957*, 536 F. Supp. 1138, 1143 (S.D. Ohio 1982). Indeed, for this very reason, the Court excluded from evidence in the trial in this case, on grounds of relevancy, the ultimate dismissal of said complaint by the NLRB on February 11, 1981. It follows, as at least one court has intimated in dicta, *McNutt, supra*, that the filing of a NLRB complaint does not toll the running of a statute of limitations on a § 301 action. Nor have Plaintiffs cited any authority to the contrary.

It appears that a recent decision from the Ninth Circuit *has* reached a contrary result. In *Retail Clerks Union Local 648 v. Hub Pharmacy, Inc.*, 707 F.2d 1030 (9th Cir. 1983), the plaintiff union

sued the employer in a "straight-forward" § 301 action, rather than a "hybrid" § 301/duty of fair representation suit, such as the within matter. Finding that the applicable statute of limitation would be derived from state law, *id.* at 1033, the court also applied state law to determine if tolling was appropriate. *Id.* Based on California's law of equitable tolling, the Court concluded that an attempt by the union to resolve the case before the NLRB should toll the running of the limitations statute during the period of the NLRB proceedings. *Id.* at 1037.

For the reasons of statutory construction set out above, this Court does not find the Ninth Circuit's ultimate result compelling. In addition, it should be pointed out that, after *Delcostello*, a "straight-forward" § 301 suit would still be governed by a *state* statute of limitation, *see*, 103 S.Ct. at 2287 n.12, 2294, and *state* tolling rules would presumably apply, as well. *See, Chardon v. Fumero Soto, supra*. However, "hybrid" § 301 cases are now governed by a *federal* limitations period, presumably meaning that *federal* tolling rules (to be developed by courts), rather than their *state* counterparts, apply. *Cf. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) (Title VII tolling rules); *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965) (FELA tolling rules). Thus, the Court in this action is not compelled to look toward Ohio law for the rules of tolling.

In any event, even accepting the Ninth Circuit's position does not change the result of this case. The *Retail Clerks* court emphasized that the § 301 limitations period was only tolled during the pendency of the NLRB proceeding; it did not initially start to run again after said proceeding was terminated. 707 F.2d at 1033. Here, the NLRB proceeding began in December of 1980 and culminated approximately three months later. Assuming, as this Court does, that Plaintiffs' action accrued, at the latest, in July, 1980, the tolling of the six month limitation period during

the NLRB proceeding still makes the June 24, 1981, filing date untimely.

Based on the foregoing, the Court concludes that Plaintiff's action is barred by the statute of limitations, and that Defendants' motions for judgment notwithstanding the verdict must be, and are, sustained.

Judgment is to be entered for the Defendants. However, given that the Court permitted Defendants to raise the ultimately successful limitations defense on the first day of trial (the defense would otherwise have been waived), the Court deems it appropriate to give Plaintiffs' counsel the opportunity to recoup litigation expenses against Defendants, for having prepared for and for having participated in the trial. Plaintiffs' attorney should have the opportunity to be reimbursed for any actual expenses of litigation and preparation for trial he incurred, which expenses might not have been incurred had Defendants asserted their ultimately valid defense in a more timely fashion. *See, Pierce v. County of Oakland*, 652 F.2d 671 (6th Cir. 1981) (per curiam); *Estes v. Kentucky Utilities Co.*, 636 F.2d 1131, 1134 (6th Cir. 1980).

Plaintiffs' counsel is given twenty days from date of receipt of this entry to file a request for the assessing of litigation costs against Defendants. Any such costs should be set forth by way of affidavit. Defendants are given seven days after receipt of counsel's request to respond to same.

Failure of Plaintiffs' counsel to file such a request within the indicated time will indicate to the Court that the Plaintiffs' attorney does not wish to seek the recovery of litigation expenses and the captioned cause will be terminated upon the docket records of this Court.

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s/ Walter H. Rice
WALTER H. RICE
UNITED STATES DISTRICT JUDGE

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APPENDIX I — JUDGMENT ENTRY ON A JURY VERDICT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO FILED JULY 26, 1982

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Civil Action File No. C 3-81-343

ASSOCIATION OF FRIGIDAIRE MODEL MAKERS, et al.

vs.

GENERAL MOTORS CORP. et al.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Walter H. Rice, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged that the Jury finds for the Plaintiffs and against the defendants as to liability only.

Dated at Dayton, Ohio, this 26th Day of July, 1982.

APPROVED FOR FILING:
s/ Walter H. Rice
United States District Judge

John D. Lyter
Clerk of Court

BY: s/ R.L. Snell
Deputy